IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents.

RESPONDENTS' BRIEF

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Additional Constitutional and Statutory Provisions Involved

In his specification of the constitutional provisions, statutes and rule involved in this case (Br. 2), plaintiff has omitted the Seventh Amendment to the United States Constitution; the Rules Enabling Act, 28 U.S.C. § 2072; 28 U.S.C. § 2106; and Section 19 of the Securities Exchange Act of 1934, 15 U.S.C. § 78s. These provisions are set forth in the Supplemental Appendix to this brief.[1]

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1. "sa" refers to Supplemental Appendix.

Questions Presented for Review

1. Did Rule 23, Federal Rules of Civil Procedure, as amended in 1966, change the substantive law to permit a "fluid class recovery" of money damages to be awarded under the antitrust laws and Securities Exchange Act of 1934 to a class "as a whole" of future purchasers or sellers, many of whom could not have been injured in their business or property or in any other way by defendants?

2. In this *in personam* action for money damages, do due process and Rule 23 require individual notice to the 2,250,000 class members "who can be identified through reasonable effort"?

3. Does the notice program ordered by the District Court for the 6,000,000 class members meet the requirements of due process and Rule 23?

4. May 90% of the cost of notice to such a class in such an action, in the amount of $19,548, be imposed upon defendants when such costs concededly will be unrecoverable if defendants prevail before the jury at trial on the merits?

5. May defendants be compelled to undergo a preliminary trial on the merits before the Court in a jury case in order to determine whether, on the basis of the probability of plaintiff's success on the merits, defendants will be compelled to finance a lawsuit against themselves?

6. Is this case manageable as a class action by any reasonable interpretation of Rule 23?

7. Did the Court of Appeals have jurisdiction?

Counterstatement of the Case

The argument for reversal rests largely upon alarmist mischaracterizations of the nature and effect of the decisions below. A full counterstatement of the case is necessary to reveal how far astray this argument goes in attempting to broaden the impact of this case beyond its own facts and the two scholarly and carefully circumscribed Court of Appeals' decisions.

The Complaint

The complaint[2] in this action, filed on May 2, 1966, alleges that the suit is a class action brought on behalf of all purchasers and sellers of odd-lots on defendant New York Stock Exchange ("the Exchange"). The complaint does not, as plaintiff contends (Br. 8), specify any time during which purchase or sale was required to qualify as a member of the alleged class. The class was subsequently limited by the District Court to purchasers and sellers during the period May 1, 1962 through June 30, 1966. 52 F.R.D. at 261; A210-211.

Defendants Carlisle & Jacquelin and DeCoppet & Doremus, then separate member firms of the Exchange, are alleged in the first two causes of action to have violated Sections 1 and 2 of the Sherman Act by fixing the odd-lot differential[3] and monopolizing odd-lot trading on the Ex-

2. While plaintiff has printed the complaint in the supplemental appendix (A21-26), he has omitted from the first printed page the words "Plaintiff Demands Jury Trial". So that there will be no doubt that this is a jury case, the entire first page of the complaint appears in the Appendix hereto (7-8 sa).

3. The odd-lot buyer pays a fraction of a point more per share and the odd-lot seller receives a fraction of a point less per share than the controlling round-lot price. This fraction is called the "odd-lot differential."

change. In the third cause of action, the Exchange is alleged to have violated Sections 6 and 19 of the Securities Exchange Act of 1934 by failing adequately to regulate the odd-lot differential—which differential, it is further alleged (complaint ¶ 26; A25), is placed within the Exchange's jurisdiction by section 19(b) of the Exchange Act.

The complaint demands (1) treble damages from the odd-lot firms for plaintiff and his alleged class in an amount to be established at trial; (2) a "fund [for the payment of such damages] in an amount equal to treble that portion of the differential collected in the past which has been excessive"; (3) an unspecified amount of damages from the Exchange; (4) an injunction prohibiting any differential which is "excessive"; and (5) attorneys' fees.

Proceedings Below

Upon defendants' motion, the District Court (Tyler, *J.*) by decision dated September 27, 1966 (41 F.R.D. 147; A93) dismissed the action as a class action because (a) the notice required by the Due Process Clause and Rule 23(c)(2), Federal Rules of Civil Procedure, could not be given; (b) questions common to the class did not predominate over questions affecting individual members; and (c) plaintiff had failed to demonstrate that he would be able fairly and adequately to protect the interests of the class.

Eisen I

Plaintiff's motion for certification pursuant to 28 U.S.C. § 1292(b) was denied on October 25, 1966. A103. Plaintiff then filed a notice of appeal from the District Court's

decision, and defendants moved to dismiss the appeal on the ground that the order appealed from was not final. The Court of Appeals (Waterman, Moore and Kaufman, Circuit Judges, per Kaufman, *J.*) by decision dated December 19, 1966, held that the denial of class action status was appealable under this Court's decision in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), as a final order under 28 U.S.C. § 1291 because, in view of the small amount of the individual claim involved, it constituted the "death knell" of the action. (*Eisen I*[4]) 370 F.2d 119; A104. Defendants' motion for rehearing and rehearing *in banc* was denied. A108-109. Defendants then petitioned this Court for certiorari, arguing that review was appropriate because (a) the *Cohen* principle had been misapplied in that plaintiff had not been denied a substantive right; (b) there was no reason to assume plaintiff would not pursue his individual claim, if meritorious, in light of the established availability [under Section 4 of the Clayton Act and the common law] of attorneys' fees not limited by the principal amount of the recovery; and (c) the "death knell" standard would lead to a lack of uniformity and uncertainty in respect to an important federal statute defining the jurisdiction of Courts of Appeals. Certiorari was denied. 386 U.S. 1035 (1967).

Eisen II

The appeal was then heard on the propriety of the District Court's dismissal of the action as a class action. By opinion dated March 8, 1968, the Court of Appeals (Medina,

4. This brief from time to time utilizes what have become the common short-form references to the Court of Appeals' decisions in this case: *Eisen I*—370 F.2d 119 (1966), A104; *Eisen II*—391 F.2d 555 (1968), A110; *Eisen III*—479 F.2d 1005 (1973), A346.

Lumbard and Hays, Circuit Judges, per Medina, *J.*, Lumbard, *C.J.*, dissenting) reversed, articulated a number of principles in regard to facts then in the record, expressly retained jurisdiction, and remanded to the District Court for an evidentiary hearing to determine further facts consistent with the Court's opinion. (*Eisen II*) 391 F. 2d 555; A110. The majority never held (as plaintiff asserts, Br. 9) "that the suit was in all respects maintainable as a class action under Rule 23(a) and 23(b)(3)"—but left that question open for its own later determination in the light of further facts to be found by the District Court and the application of the neutral principles articulated in the Court of Appeals' opinion.[5]

On the question of notice, the Court of Appeals said:

> "Notice, as an integral part of due process must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'
>
> * * * * *
>
> "The task of furnishing notice to the class members *in such a case as this* must rest upon the representative party when he is the plaintiff." 391 F.2d at 568; A129. (emphasis added) (footnote omitted)

5. In *Eisen III*, the Court aptly characterized its action in *Eisen II*: "[o]n that appeal we remanded the case to the District Court for reconsideration and for findings on specific issues and we retained jurisdiction. While entertaining grave doubts on the questions of notice and manageability, we thought the original rejection of the case as a class action had been too summary, that improper standards had been applied and inadequate consideration given to the specific requirements of Amended Rule 23." 479 F.2d at 1007; A348-349.

* * * * *

". . . we assume that some sort of ritualistic notice in small print on the back pages of a newspaper would in no event suffice." 391 F.2d at 569; A131.

* * * * *

". . . if the Court finds that a considerable number of members of the class can be identified with reasonable effort, and financial considerations prevent the plaintiff from furnishing individual notice to these members, there may prove to be no alternative other than dismissal of the class suit." 391 F.2d at 570; A132.

On the question of manageability, the Court of Appeals said:

"Bearing in mind the desirability of providing small claimants with a forum in which to seek redress for alleged large scale anti-trust violations, we are still reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them.

* * * * *

"If as a practical matter class members are not likely ever to share in an eventual judgment, we would probably not permit the class action to continue.

". . . it is not inconceivable that the District Court on remand may conclude that these separate questions present insuperable problems of judicial administration sufficient to justify the dismissal of the action." 391 F.2d at 567; A126-128 (footnotes omitted).

In conclusion, the Court of Appeals directed:

> "Accordingly, the order appealed from is reversed; we retain jurisdiction, and the case is remanded for a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the questions of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper." 391 F.2d at 570; A133.

Chief Judge Lumbard filed a dissenting opinion in which he catalogued difficulties that would be inflicted upon the Court in managing the action as a class action and stated, among other things:

> "Even if plaintiff is unable to maintain an action, when a controversy touches the interest of so many members of the public it is sufficient that Congress has provided a public agency whose duty it is to supervise and regulate such matters. Comment, Recovery of Damages in Class Actions, 32 U.Chi.L.Rev. 768, 785 (1965). The matter of proper commissions to be paid by those who engage in odd-lots transactions is within the jurisdiction of the SEC. It has been the subject of study and in due time the Commission will take appropriate action.
>
> "The appropriate action for this court is to affirm the district court and put an end to this Frankenstein monster posing as a class action." 391 F.2d at 572; A137.

District Court Proceedings under *Eisen II*

After submission of stipulations (A182-195), undisputed affidavits (A169-181), and a hearing at which testimony was taken (A139-163), by opinion and order dated April 7, 1971 (52 F.R.D. 253; A199), the District Court made extensive findings of fact (A200-208) pursuant to the remand instructions of the Court of Appeals. In summary, the District Court found that:

(a) Approximately 6,000,000 "shareholders" (defined as public individuals, institutions, and intermediaries of a great variety, 52 F.R.D. at 256; A200) had odd-lot transactions during the period from May 1962 through June 1966 in stocks listed on the Exchange.

(b) During the period May 1962 through June 1966 the typical buyer or seller of odd lots had approximately five transactions on the Exchange, and the average odd-lot differential per transaction was approximately $5.18.

(c) Of the approximately 6,000,000 shareholders who had odd-lot transactions from May 1962 through June 1966 in stocks listed on the Exchange, the names and addresses of at least one-third, i.e., 2,000,000, can be identified through the use of computer tapes and the names and addresses of approximately two-thirds, or 4,000,000, cannot be identified with "reasonable effort."

(d) Additionally, approximately 250,000 persons investing in odd-lots through a "Monthly Investment Plan" and payroll deduction plans can be identified through the use of computer tapes.

(e) The shareholders who had odd-lot transactions from May 1962 through June 1968 in stocks listed on the Exchange reside in every state in the United States as well as in most non-Communist countries in the world. Approximately 6% reside in foreign countries.

(f) During the relevant period, the Exchange employed an advertising program under which it advertised in 755 domestic newspapers. The approximate cost of the space for a single one-eighth page insertion in these 755 newspapers was $65,000. The approximate cost of the space for

a single one-eighth page insertion in every daily newspaper in the United States and Puerto Rico is $110,000.

(g) A representative sample of computer tapes from the fourteen largest brokerage firms (consisting of the tapes from four such firms) indicates that 1,967 accounts during the period from mid-1962 through mid-1966 had ten or more odd-lot transactions.

(h) In *Cherner* v. *Transitron Electronic Corporation*, 201 F.Supp. 934 (D.Mass. 1962) the distribution of a settlement fund of $5,300,000 among 33,036 claimants cost $25.47 per person excluding attorneys' fees and $33.80 per person including attorneys' fees.

(i) In *State of West Virginia* v. *Chas. Pfizer & Co., Inc.*, 314 F.Supp. 710 (S.D.N.Y. 1970) (hereinafter the *Drug Cases*) the distribution of a $37,000,000 settlement fund to the class of approximately 150,000,000 persons located in every state of the Union and Puerto Rico cost approximately $285,000, including $130,000 for the cost of notice in every English and Spanish language newspaper of general circulation published in the United States, $30,000 for a notice of the proposed settlement in the two newspapers of largest circulation in each state, $21,900 for preparation of mailing lists and other general expenses, and $100,000 for the processing of approximately 42,000 individual claims.

(j) The cost for stuffing a single page printed notice and mailing it with first class domestic postage would be 10¢ per letter including the postage, irrespective of the number of letters to be sent.[6]

Upon such findings, the District Court went on to hold, directly contrary to its initial decision, that the action

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6. This finding was based on a postage rate of 6¢ for a first class letter.

could be maintained as a class action. To do this, the Court adopted the novel theory of a "fluid class recovery" to benefit future odd-lot purchasers and sellers through an adjustment of the odd-lot differential *in futuro*. This concept, the District Court held, would mean that gross damages can "be fairly estimated without having individual claims filed by each class member." 52 F.R.D. at 262; A211. With respect to payment of any possible damages, the Court held:

> "Distribution of an eventual recovery to the class members in a case such as this one need not be viewed solely in terms of personal and individual damages and recoupment thereof. * * * I think it appropriate, as plaintiff urges, to consider some kind of 'fluid class recovery', i.e. to consider distribution of damages to the class as a whole rather than to adopt, at this initial, planning stage, an inflexible mold of recovery running to specific class members. To emphasize individual recovery is to unduly stress considerations not wholly relevant to the conditions of this case . . ." 52 F.R.D. at 264; A216.

The Court found "that a fund equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the court until such time as the fund is depleted." 52 F.R.D. at 265; A217. Even utilizing the "fluid class recovery" concept, the District Court found that the sum "required for paperwork, printing, postage and publication is $500,000 in round numbers." 52 F.R.D. at 263; A214.

Despite finding that 2,250,000 of the class members can be identified by simply running computer tapes (Findings of Fact 5, 9, 10; 52 F.R.D. at 257-258; A201-204), the

District Court outlined a notice program in which individual notice would be sent only to 2,000 class members who had 10 or more odd-lot transactions plus 5,000 additional class members selected at random, and a ¼ page notice would be published twice in five newspapers in three cities. 52 F.R.D. at 267-268; A221-224. Thus, less than ½ of 1% of the readily identifiable class members would receive individual notice. The cost of this nominal program was stated to be $21,720, based on the District Court's cost estimates. 52 F.R.D. at 263; A213.

Since plaintiff had stated from the outset that he could not pay the expense of individual notice, the District Court decided to hold a preliminary hearing on the merits to serve as a basis for allocation of the expenses of the notice that the Court thought sufficient. 52 F.R.D. at 270-272; A229-233. The preliminary hearing (or so-called "mini-hearing") was held over defendants' objections expressed both to the District Court and to the Court of Appeals. A296. Both sides submitted documentary evidence and briefs. No witnesses were called. Plaintiff concluded his argument with a plea that he could not pay any more than token notice costs. A273.

The District Court subsequently issued a further opinion (54 F.R.D. 565; A275) concluding that the odd-lot defendants had fixed the differential in 1951, that this was a *per se* violation of the antitrust laws, and that the Exchange was an active participant through its failure to regulate. The District Court found that plaintiff was likely to prevail at trial on the merits and ordered defendants to pay 90% ($19,548) of the notice cost. No consideration was given to the reasonableness of the circumstances or of the

differential, or to the fact that, as its minutes showed (Ex. J at the preliminary hearing), the S.E.C. had advised the parties before the challenged differential went into effect in 1951 that it had no objection to the new rate.

The Preliminary Hearing on Liability and Damages

The District Court based its substantive conclusions on the fact that the Exchange regulated the odd-lot differential through settled practice rather than formal rule. The District Court failed to give effect to the regulatory context in which the differential was determined, including S.E.C. supervision and hearings. Findings 12 and 14, 54 F.R.D. at 572; A280-281.

Defendants had contended at the mini-hearing that under this Court's decision in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), and its progeny,[7] and *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), the following uncontroverted facts in the record showed plaintiff's claims to be without merit:

> (1) Sections 19(b)(9) and (11) of the Securities Exchange Act, 15 U.S.C. §§ 78s(b)(9) and (11), give the S.E.C. power to order changes in rules *and practices* of the Exchange particularly in respect of the fixing of reasonable rates of commission, interest, other charges and odd-lot purchases and sales, when necessary or appropriate for the protection of investors or to insure fair dealing in securities traded on such exchange or to insure fair administration of such exchange. At 5-6 sa.

7. See also the recent decisions in *Chicago Mercantile Exchange* v. *Deaktor*, CCH Trade Reg. Rep. ¶74,806 (U.S. Sup. Ct., December 3, 1973) and *Gordon* v. *New York Stock Exchange*, CCH Sec. Law Rep. ¶94,235 (S.D.N.Y., December 4, 1973); *Haddad* v. *The Crosby Corp.*, Civ. No. 2454-72 (D.C.D.C. December 14, 1973)

(2) The S.E.C. has concurred that practices are co-equal with rules for purposes of Section 19(b). *In re the Rules of the New York Stock Exchange*, 10 S.E.C. 270, at 293 (1941).

(3) Historically it had been the practice for the odd-lot differential to be set by the odd-lot firms with the concurrence of the Exchange and the S.E.C., and such practice was left undisturbed by the S.E.C. after lengthy consideration of the Exchange's rules and practices respecting odd-lot trading, including the differential, in the light of, among other things, antitrust considerations. *In re the Rules of the New York Stock Exchange*, 10 S.E.C. 270, 284, 287-288 (1941).

(4) Between 1950 and 1964 the Exchange had each year advised the S.E.C. that "transactions in odd-lots are effected on this exchange under methods which have been prescribed by the odd-lot brokers and dealers with the acquiescence of the Exchange" (Ex. E at the preliminary hearing).

(5) The 1951 increase in the differential here alleged to be a violation of the antitrust laws and the Exchange Act was, with the approval of the Exchange, presented to the S.E.C. by the odd-lot defendants and elicited S.E.C. approval, as shown by the following minutes of the S.E.C.:

> "After due consideration, the Commission took the position, and so advised Mr. Hanrahan [attorney for the odd-lot defendants], that . . . the Commission had no objection to the present proposal for an increase in the odd-lot differential and would

take no action, if the firms of Carlisle & Jacquelin and DeCoppett & Doremus should proceed with such increase." (Ex. J at preliminary hearing)

(6) The question of the 1951 increase in the differential was thereafter presented again by the Midwest Stock Exchange to the S.E.C. and approved by the S.E.C. after a two-day hearing (Ex. Q, Ex. 1, p. 183; Ex. 7, pp. 41-44 at the preliminary hearing).

(7) Formal adoption of the increase by the Exchange was reported to the S.E.C. by the Exchange's letter of August 17, 1951 (Ex. K at the preliminary hearing).

(8) In April 1964 the Exchange enacted a formal rule establishing the differential to be the one in effect at the time.

(9) A cost study undertaken by Price Waterhouse (Ex. A at the preliminary hearing) at the direction of the Exchange and the S.E.C. was completed on June 14, 1966, and found the past profits of the odd-lot defendants to have been reasonable in comparison to similar businesses.

(10) On June 16, 1966 the Exchange amended its rule at the request of the S.E.C. made pursuant to Section 19(b) of the Exchange Act to raise the breakpoint to \$55[8] (Ex. C at the preliminary hearing).

8. As publicly announced, effective July 7, 1972, due to economies recently effected in the manner of handling odd-lot orders, the differential was reduced by amendment of Exchange rule after the prior required notification to the S.E.C. so that all odd-lot trades are presently effected at a uniform ⅛ point. Of course, this change does not benefit the "class" of purchasers and sellers during 1962-1966 which plaintiff claims to represent.

(11) In 1969 the Justice Department approved the merger of the two odd-lot firms, principally on the ground that the odd-lot business was unique and a "natural monopoly." (letter of Richard W. McLaren, September 17, 1969; Ex. D at the preliminary hearing).

Thus, despite clear statutory power over the differential, the S.E.C. ordered no change until 1966—apparently satisfied that the differential it had approved in 1951 was appropriate during that 15-year period.

Defendants also contended that even if there were liability, there could be no provable damages. The damage estimates of the District Court were based not upon any evidence but upon the assumption that because there was in 1966 a reduction in the odd-lot differential to reflect economies, the differential during the 1962-1966 period would have been, absent the allegedly illegal rate-fixing, the differential after the 1966 reduction. 52 F.R.D. at 265; A218-219. Defendants had argued that the record showed that if the differential had not been established by practice, it would have been set by rule of the Exchange (as it was in 1964) or by the S.E.C. exactly at the point at which it was set by the alleged conspirators because both regulatory agencies had determined such level to be reasonable.

The Decision Below (*Eisen III*)

Immediately after the preliminary hearing, defendants moved the Court of Appeals (A291-308) to take up the matter again pursuant to the jurisdiction which that Court had retained in its 1968 decision. (*Eisen II*) By orders dated May 1, 1972 and August 24, 1972, the Court (Me-

dina, Lumbard and Hays, Circuit Judges) granted the motion. A313-314; 327. Prior thereto, and because plaintiff had attacked the jurisdiction retained by the Court of Appeals in *Eisen II*, defendants filed a notice of appeal from the decisions, opinions, and orders of the District Court dated April 7, 1971 and April 4, 1972. A315-316. Plaintiff's motion to dismiss the appeal (A317-321) was denied by the Court's order of June 29, 1972. A322.

After receiving briefs and hearing oral arguments, the Court of Appeals by decision dated May 1, 1973 (479 F.2d 1005; A346) (Medina, Lumbard and Hays, Circuit Judges), reversed the District Court's ruling permitting the action to be prosecuted as a class action, vacated the findings and conclusions of the District Court on the mini-hearing, and dismissed the action as a class action without prejudice to continuation of the action by plaintiff individually. Judge Medina, joined by Judge Lumbard, filed an opinion (479 F.2d 1005; A348) based on the principles set forth in *Eisen II* and well-established precedents of both this Court and other Courts of Appeals. The opinion held, among other things, that:

1. Rule 23 is a procedural device to facilitate judicial disposition of the individual claims of separate members of a class of persons so numerous that joinder of all members is impractical; the rule was not intended to affect substantive rights, nor could it do so under the Rules Enabling Act.

2. Rule 23 cannot alter the principles of substantive law to make permissible a "fluid class recovery" for claims under Section 4 of the Clayton Act and Section 6 of the Exchange Act.

3. In an *in personam* action for money damages, such as this, Rule 23(c)(2) and due process require "individual notice to all members who can be identified through reasonable effort."

4. In a purely adversarial situation, such as this, the plaintiff must pay the expense of giving notice to the members of his class.

5. The mini-hearing on the merits was not authorized by Rule 23 or any other rule, statute or principle and violated defendants' constitutional safeguards.

6. The evidence on remand as to plaintiff's unwillingness to pay for notice, the diversity and dispersion of the class, and the difficulty of processing and distributing any recovery, as compared with the costs of administration, showed the action to be unmanageable as a class action, as had been feared by the majority and forecast by Chief Judge Lumbard in the Court's 1968 opinions.

Judge Hays filed a separate memorandum (479 F.2d at 1020; A374) concurring in the result because he could not accept the District Court's requiring defendants to pay 90% of the cost of notice ($19,548) which could never be recovered if defendants prevailed before the jury at trial on the merits.

Since the argument for reversal misstates and overstates the scope of the Court of Appeals' carefully reasoned and circumscribed decision in *Eisen III*, it is important to know what the Court of Appeals did not hold:

1. *Eisen III* did not hold, as plaintiff contends (Br. 13), that the Court of Appeals had jurisdiction to re-

view the order of the District Court "because all orders sustaining class actions are appealable." The jurisdiction of *Eisen III* was based on two separate and sufficient grounds: retained jurisdiction and a notice of appeal. The Court of Appeals suggested that the "collateral order doctrine" of *Cohen* v. *Beneficial Industrial Loan Corp.*, should be equally applicable to both denials and grants of class action status where, as here, all of the requisites of that doctrine had coalesced to afford the required finality. 374 F.2d at 1007, n.1; A348-349. That is far from holding that all orders sustaining class actions are appealable.[9]

2. *Eisen III* did not hold, as plaintiff contends (Br. 14), that "[i]n virtually every class action—whether brought under Rule 23(b)(1), (b)(2) or (b)(3) . . . plaintiff must send and pay for individual notice to every class member who can be identified." In *Eisen II*, the Court of Appeals ruled that "in such a case as this" "[t]he task of furnishing notice must rest upon the representative party when he is the plaintiff." 391 F.2d at 568; A129. In the decision below, the Court reiterated the limited nature of this holding (alternatively using the language " 'in this type of case' ", 479 F.2d at 1009; A351), pointing out that this is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Exchange Act and not a shareholder's action or an action against a public utility sending monthly bills to its customers. 479 F.2d at 1009, n.5; A351-352.

9. In accordance with the Court's request in its order granting certiorari, we discuss the Court of Appeals' jurisdiction in more detail at pp. 82-96 *infra*.

In such cases, the question of who pays for whatever notice is required is to be decided on the particular facts before the court. 479 F.2d at 1009, n.5; A351-352. Nor did the Court of Appeals hold that individual notice to every class member who can be identified was required in a (b)(1) or (b)(2) action. The Court merely held that *some form of notice* was required by due process in (b)(1) and (b)(2) actions. 391 F.2d at 564-565; A122.

3. *Eisen III* did not hold, as plaintiff contends (Br. 14), that "[a]ny kind of newspaper notice is 'a farce' . . . due process and Rule 23 require that every class member receive individual notice of the pendency of the action." What the Court of Appeals did hold was that in a case such as this, where ". . . the evidence further disclosed that the class membership was of such diversity and was so dispersed that no notice by publication could be devised by the ingenuity of man that could reasonably be expected to notify more than a relatively small proportion of the class . . ." (479 F.2d at 1016-1017; A367) and "[w]here there are millions of dispersed and unidentifiable members of the class notices by publication giving the essential information required by amended Rule 23 are a farce." 479 F.2d at 1017; A368-369.

The *In Banc* Opinions

On May 14, 1973, plaintiff filed a petition for rehearing by the Court of Appeals containing a suggestion for rehearing *in banc*. See A375. Rehearing was denied. In decisions filed on May 24, 1973, the five member majority

of the active judges voted to deny an *in banc* hearing and expressed confidence that this Court would grant certiorari. 479 F.2d at 1020; A375. The opinion of Judge Oakes dissenting from denial of rehearing *in banc* (479 F.2d at 1021; A378) is liberally quoted throughout plaintiff's brief. Understandably, Judges Oakes' dissenting opinion was written in a short time without the benefit of the consideration and reflection which was available to the panel. It reflects strong concern that the panel's decision in *Eisen III* might adversely affect environmental and consumer actions affecting large numbers of citizens. Analysis of the Court of Appeals' panel decision, however, shows Judge Oakes' concern to be misplaced. See, *e.g.*, pages 100-101, *infra*.

Summary of Argument

Plaintiff bases his plea for reversal on the reiterated claim that defendants are "wrongdoers" who cannot be permitted to retain these "fruits of their violations". *E.g.*, Br. 16. Plaintiff argues that the "fruits of their illegality" (Br. 28) can be recovered only by permitting this action to be maintained as a class action. The fundamental premise for this extraordinary position—that defendants, who who were in fact acting openly and under the scrutiny of the S.E.C. and the Department of Justice, have violated the antitrust laws and the Exchange Act and have damaged the "class" to the tune of $120 million—is false. With the collapse of the premise, the conclusion falls and plaintiffs' arguments are revealed as nothing but efforts to obtain favored judicial treatment for this particular case.

Plaintiff omits any recognition of the cost of his philosophy to the judiciary, the expense to the litigants, and

the sacrifice of the procedural and substantive rights of both defendants and absent class members. All of plaintiff's arguments come down to one simple theme: this action cannot qualify for class action status unless this Court is prepared to tolerate abrogation of the substantive law otherwise applicable—including essential constitutional guaranties, congressional mandates, and long established principles of decisional law. Such changes in substantive law are precluded by the Rules Enabling Act and the decisions of this Court.

The "fluid recovery" concept, which plaintiff has conceded is the only means of making the case manageable, would change the substantive law to permit money damages to be awarded under the antitrust laws and the Exchange Act to a class "as a whole" of unascertainable future purchasers or sellers (which may not even include plaintiff), many of whom could not have been injured in their businesses or property or in any other way by defendants' past conduct.

Similarly, the denial of individual notice "in such a case as this" to the 2,250,000 readily identifiable class members would violate the due process requirement of the Fifth Amendment as interpreted by this Court and the provisions of Rule 23 itself.

Substantive law must also be judicially legislated to provide authorization for the District Court to conduct a preliminary hearing on the merits in a jury case, and on the basis of such a hearing to require unwilling defendants to pay, in abrogation of their Seventh Amendment guarantee to trial by jury, a sum of almost twice the jurisdictional amount (almost $20,000) to finance a lawsuit against themselves.

The federal courts are not the forum in which to legislate the changes in substantive law which plaintiff argues are necessary for him to play the role of "private attorney general". Absent such legislation (including amendment of the Constitution itself), this case, like many other cases decided to date, is admittedly unmanageable under Rule 23 and should be dismissed as a class action. If plaintiff is unwilling to litigate his individual claim, even with the inducement of a reasonable attorneys' fee, that decision is the best evidence of the fact that this case is nothing but a manufactured claim designed to obtain an *in terrorem* settlement upon which to base a sizeable award of attorneys' fees.

The decisions and orders of the District Court in 1971 and 1972 adopted plaintiff's philosophy and thus constituted a final order under the *Cohen* doctrine. They denied defendants and class members important substantive rights which could never be redressed should the action then go forward without review. For that reason, the Court of Appeals in *Eisen III* had jurisdiction as a result of defendants' notice of appeal. If the "death knell" decision of *Eisen I* was correct, the Court of Appeals also had jurisdiction in *Eisen III* through its inherent power to retain that jurisdiction in its *Eisen II* decision.

ARGUMENT

I

Rule 23 is a procedural device that cannot alter substantive rights.

The primary change effected by the 1966 amendments to Rule 23 was replacement of the so-called "spurious class action" under the old rule, which was only a permissive joinder device, with a procedure whereby the binding effect of the litigation in *in personam* money damage cases would extend to all class members, rather than being limited to those who intervened in the action. Advisory Committee Note, 39 F.R.D. 98-99; 10-11 sa.[10] The rule was drafted, as it had to be, within the confines of substantive law. The congressional grant of authority to this Court to promulgate rules governing procedures expressly provided that:

> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right to trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." Rules Enabling Act, 28 U.S.C. § 2072; 2 sa.

The Court of Appeals in *Eisen II* stated that the "liberal interpretation", which it directed, was to be applied to "all factors enumerated on the face of the rule itself". 391 F.2d at 563; A119. Such an application recognizes that Rule 23 is a procedural rule and that under the Rules Enabling Act the Rule could not have been intended to alter substantive

10. The entire Advisory Committee Note to Rule 23 is reprinted in the Appendix hereto. 9 sa, et seq.

law. If the Rule were construed to permit alteration of substantive rights, the Rule as so applied would be invalid under the Rules Enabling Act. *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Sibbach* v. *Wilson and Company*, 312 U.S. 1 (1940). Accord: *Zahn* v. *International Paper Co.*, — U.S. — (December 17, 1973). Thus, the Court of Appeals in *Eisen III* correctly began with the proposition that it was construing a procedural rule designed to achieve economy and uniformity of decision, and a rule which could not change the substantive law, enlarge existing remedies, or sweep away established procedural safeguards. 479 F.2d at 1013-1014; A361.

From the face of Rule 23(b)(3), it is clear that the Rule is a procedural device for bringing together in one forum existing claims of actual individual plaintiffs to achieve economies and uniformity of decision where that can be done without sacrificing procedural fairness or bringing about other undesirable results. The Rule in no way suggests that the class "as a whole" has a right to recover money damages. Nor that the proper notice which is the right of any person who will later be bound by the litigation can be omitted under any circumstances. Nor does the Rule suggest that its purpose is to punish alleged wrongdoers.

For maintenance of an action under Rule 23(b)(3), the Rule[11] requires that the prerequisites of Rule 23(a) as well as Rule 23(b)(3) be met.

Rule 23(a) requires that: the class be so numerous that joinder is impractical; there are common questions of law or fact; the claims or defenses of the representative parties

11. The complete text of Rule 23 is set forth in plaintiff's brief at pages 2-5.

are typical of the claims or defenses of the class; and the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(3) requires the court to find that common questions of law or fact predominate over questions affecting individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In so determining, the Rule directs the court to consider such things as the interest of class members in individually controlling the prosecution or defense; the extent of any litigation already commenced; the desirability of concentrating the claims in the particular forum; and the difficulties likely to be encountered in management of a class action.

The neutral, procedural purpose of the Rule is clear from the Advisory Committee's Note:

> "*Subdivision (b)(3).* In the situations to which this subdivision relates, class-action treatment is not as clearly called for as those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. Chafee, *supra* at 201." 39 F.R.D. at 102-103; 18-19 sa.

The intent of the Advisory Committee is reflected in the comments of Professor Benjamin Kaplan, who at the time of the drafting of the Rule was the Reporter to the

Committee and subsequently became a member of the Committee:

> "The object [of Rule 23(b)(3)] is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure* (I), 81 Harv.L.Rev. 356, 390 (1967).

Plaintiff suggests repeatedly (*e.g.* Br. 29, 44, 45, 50, 51) that because the class action procedure originated on the equity side of the courts, as opposed to the law side, there results some implicit authority in Rule 23 to change substantive law to permit an action to be maintained as a class action. This suggestion is, of course, without basis. In the cases which plaintiff cites to support this suggestion, *Smith* v. *Swormsted*, 57 U.S. 288 (1853), *Hansberry* v. *Lee*, 311 U.S. 32 (1940), and *Montgomery Ward & Co., Inc.* v. *Langer*, 168 F.2d 182 (8th Cir. 1948), it could not be clearer that the Courts viewed the class action solely as a procedural device to achieve economy and convenience by permitting parties to sue or be sued representatively where the requirements of substantive law were complied with. In *Hansberry* v. *Lee*, the Court said:

> "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impractical. . . ." 311 U.S. at 41.

Montgomery Ward & Co., Inc. v. *Langer* merely quotes *Hansberry's* reference to "an invention of equity" and adds that the invention was "mothered by the practical necessity of providing a procedural device . . ." 168 F.2d at 187.

Plaintiff's invocation of "equity" as authority to change substantive law is erroneous. The truth is that because the class suit is "an invention of equity" Rule 23 should never be used to infringe on any person's substantive rights or constitutional guarantees.

II

Neither the antitrust laws nor the Exchange Act authorizes an award of damages to a class "as a whole" of future purchasers and sellers who have not been injured in their business or property or in any other way by defendants.

After the decision in *Eisen II*, plaintiff advanced an alternative theory of recovery in an effort to avoid the concededly insuperable problems of managing this action as a class action. Plaintiff proposed a reduction of the odd-lot differential *in futuro* to benefit future odd-lot purchasers and sellers as an alternative to money damages for actual injuries allegedly inflicted on members of the class. Plaintiff said:

> "There are some six million persons in the class. If each had to present his own personal claim for damages, the class, indeed, would not be manageable."
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> * * * * *
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> "We acknowledge that the class is not manageable in the narrow sense that it would be imprac-

ticable to compute and award damages to each odd-lot user in the period 1962-66." A196-197.

* * * * *

"Indeed, in practicality, we recognize that it would be impossible for each member of the class to spend hours or days combing his ancient files in order to recover—at best—ten or twenty dollars. Therefore, we proposed that after the amount of the damage is established, the defendants then be ordered to reduce their odd-lot differential until the damage is repaid. Notice, therefore, would not be sent to the 2,000,000 people whose names and addresses have now become ascertainable. Instead, notice could be given to the present class of odd-lot users by the various ways suggested above." A198.

Such an *in futuro* recovery had not been asked for in the complaint. See A26. There was no evidence in the record that odd-lot purchasers and sellers during the period May 1, 1962 to June 30, 1966, or even plaintiff himself, would be among those future (presumably after trial, judgment and appeal) purchasers and sellers who would be the class "as a whole" benefited by the proposed court-ordered reduction in the differential. Nevertheless, the District Court adopted plaintiff's suggestion and called it a "fluid class recovery". As to this decision of the District Court, a Committee of the American College of Trial Lawyers has said:

> ". . . the temptation to subvert substantive law comes in this instance not from policy concerns but rather from expediency." American College of Trial Lawyers Report and Recommendation of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure, at p. 18 (March 15, 1972).

Such a scheme would award recoveries to persons not injured—those who had no odd-lot transaction during the 1962-66 period, but who will trade in the future. The "fluid recovery" scheme would permit some persons allegedly injured by the challenged acts (those who had a few 1962-1966 transactions but many during the future period of reduction) to recoup more than treble the amount of damages actually sustained by them. For those reasons "fluid recovery" goes beyond the remedies provided by Congress in Section 4 of the Clayton Act and the principles articulated by all decisions discussing recovery under Section 6 of the Exchange Act, the two statutes pleaded in the complaint (A21-26) as the bases for jurisdiction and the claims for relief asserted. "Fluid recovery" would also intrude upon the exclusive jurisdiction of the S.E.C. under Section 19(b) of the Exchange Act to order changes in the odd-lot differential fixed by the Exchange.

As a matter of fact, the proposed "fluid recovery" would not even be effective to carry out the plaintiff's proclaimed purpose of equitably redistributing the defendants' "ill-gotten gains." By reason of the great diversity of types of orders and transactions in odd-lots over the years, and the extraordinary variety of entities having odd-lot transactions (A36-62, A98-9), "redistribution" on the basis suggested by plaintiff would not be equitable unless each future customer entered the same type of order for his future transactions as he did in the past.

A. The District Court's decisions are impermissible under the antitrust laws.

The right to recover treble damages is a statutory one, not one at common law. Section 4 of the Clayton Act (15 U.S.C. § 15) provides:

> "*Any person who shall be injured in his business or property* by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and *shall recover three-fold the damages by him sustained*, and the cost of suit, including a reasonable attorney's fee." (emphasis added)

The recovery of treble damages, and injunctive relief to avoid *future injury* (Section 16 of the Clayton Act, 15 U.S.C. § 26), are the only remedies given a private citizen. No remedy is provided by which past wrongs can be righted by future rate adjustments. "[P]enalties which are not authorized by law may not be inflicted by judicial authority . . ." *Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1, 77 (1911). In the leading case of *Geddes* v. *Anaconda Copper Mining Company*, 254 U.S. 590 (1921), this Court said (at p. 593): "[i]t is now the settled law that the remedies provided by the Anti-Trust Act of 1890 for enforcing the rights created by it are exclusive and therefore, looking only to that act, a suit, such as we have here, would not now be entertained."

Plaintiff cannot sue under Section 4 for the benefit of parties who have not been injured in their business or property by defendants' alleged violations. Recovery is allowed only to those who prove actual damage. This is plain and

unmistakable from the language of Section 4 and has been so understood by the courts, including this Court, from the earliest decisions. See *City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 Fed. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906), in which the Court of Appeals said of the predecessor statute to Section 4 of the Clayton Act:

> "The seventh section alone gives any remedy to one injured by such a forbidden combination or contract, and that measures the relief by the 'damages by him sustained', costs of suit, and his recoverable attorney's fees. The remedy is not given to the public, for no one may bring the action save the person 'who shall be injured,' etc., and the recovery is for the sole benefit of the person so injured and suing. It is not reasonable to construe the remedy so conferred as a penal action, for that would be to add to the punishment by fine or imprisonment imposed by the other sections of the Act an additional punishment by way of pecuniary penalty. The plain intent is to compensate the person injured. True, the compensation is to be three times the damage sustained. But this enlargement of compensation is not enough to constitute the action a penal action . . ." 127 Fed. at 28-29.

See also *Winckler & Smith Citrus Products Co.* v. *Sunkist Growers, Inc.*, 346 F.2d 1012, 1014 n.1 (9th Cir. 1965); *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956); *Turner Glass Corp.* v. *Hartford-Empire Co.*, 173 F.2d 49 (7th Cir. 1940); *Clark Oil Co.* v. *Phillips Petroleum Co.*, 148 F.2d 580 (8th Cir. 1945); *Electric Theater Co.* v. *Twentieth-Century Fox Film Corp.*, 113 F.Supp. 937, 942 (W.D. Mo. 1953); *Wolf Sales Co.* v. *Rudolph Wurlitzer Co.*, 105

F.Supp. 506 (D.Colo. 1952); *Winkler-Koch Engineering Co.* v. *Universal Oil Products Co.*, 100 F.Supp. 15 (S.D.N.Y. 1951).

The word "damages" in Section 4 of the Clayton Act has never been construed to mean anything other than money damages for those who prove they were injured in their business or property. Reduction of the odd-lot differential would not compensate those who no longer trade; it would provide a windfall for many who could not possibly claim any injury. Had Congress intended to permit the extraordinary recovery in antitrust actions which plaintiff advocates, it would have so provided. See *State of Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), in which the Court stated:

> "In enacting these [antitrust] laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their *actual* damages every time they were injured in their business or property by an antitrust violation." 405 U.S. at 262. (emphasis added)
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> * * * * *
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> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." Note 14 at 263.

Addressing himself to the effort to legislate by judicial decision a recovery under the antitrust laws for persons not

injured, Professor Milton Handler, a respected commentator,[12] has written:

> "The only category of person who may recover damages is one who has been 'injured in his business or property by reason of' a violation. The amount of his recovery, except for costs, is limited to 'threefold the damages *by him* sustained.' The language which Congress used in this statute could not be plainer. It leaves no room for awarding damages to some amorphous 'fluid class' rather than to one or more actually injured persons. It likewise does not permit any person to recover damages sustained not by him, but by someone else who happens to be a member of such class." Handler, "Twenty-fourth Annual Antitrust Review," 26 Record of the Association of the Bar of the City of New York 753, 771-72 (December, 1971).

Professor Handler points out the error in the assumption that "the class" can recover damages, "without having individual claims filed by each class member" (*Eisen*, 52 F.R.D. at 262; A211):

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12. Plaintiff's disparagement (Br. 44, n. 25) of Professor Handler as a "partisan . . . senior member of a law firm . . . actively representing numerous antitrust defendants . . ." is inappropriate. Volume 73 of the Columbia Law Review, No. 3 (March 1973), was dedicated to Professor Handler on the occasion of his retirement after forty-five years of distinguished service on the faculty of the law school. The resolution of the Faculty of Law (pp. 401-403) recites in detail Professor Handler's credentials "as a scholar, a teacher, a practicing lawyer and a public official." (at p. 401) As a practicing lawyer, Professor Handler has represented not only antitrust defendants, but also plaintiffs, with equal vigor, *e.g., Ohio Valley Electric Corporation* v. *General Electric Company*, 244 F.Supp. 914 (S.D.N.Y. 1965) (the "Electrical Equipment Cases").

> "The 'fluid class' concept thus has no relation to the nature and purpose of Rule 23. The 'class' for which the rule provides is merely a procedural device for the joint adjudication of common questions; it is not a legal entity which may recover damages in its own right. The necessity for individual proof of damages cannot therefore be obviated by awarding a recovery to the class 'as a whole.' The class as a whole has no right to recover anything. Only individual persons who have been actually injured may have such a right. By the same token, membership in a class entitles a party to nothing more than the possibility of having his own, individual damage claim adjudicated in a common proceeding; it does not confer upon him any right to receive a windfall recovery on account of damages suffered by someone else. Neither does he acquire any such right because that other person happens to also be a party to the same proceedings by virtue of some representative plaintiff's class action allegations." Handler, *supra* at page 772.

Nor can a "fluid class recovery" be reconciled with *Snyder* v. *Harris*, 394 U.S. 332 (1969). With respect to the amendment of Rule 23, this Court said:

> "Any change in the Rules that did purport to effect a change in the definition of 'matter in controversy' would clearly conflict with the command of Rule 82 that '[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . .'" 394 U.S. at 337.

Accord: *Zahn* v. *International Paper Co.*, — U.S. — (December 17, 1973).

This Court in *Snyder* v. *Harris* considered and rejected the same policy arguments plaintiff now makes to the ef-

fect that liberal interpretation of Rule 23 requires class action status. This Court said:

> "There is no compelling reason for this Court to overturn a settled interpretation of an important congressional statute [28 U.S.C. § 1332] in order to add to the burdens of an already overloaded federal court system. Nor can we overlook the fact that the Congress that permitted the Federal Rules to go into effect was assured before doing so that none of the Rules would either expand or contract the jurisdiction of federal courts. If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts." 394 U.S. at 341-342.

Section 4 of the Clayton Act, like 28 U.S.C. § 1332, is "an important congressional statute" governing jurisdiction of the federal courts. See, *e.g. Cream Top Creamery* v. *Dean Milk*, 383 F.2d 358, 363 (6th Cir. 1967); *Engelhardt* v. *Bell & Howell Co.*, 327 F.2d 30, 35 (8th Cir. 1964); *Hall* v. *E.I. DuPont DeNemours & Co.*, 312 F.Supp. 358, 359-360 (E.D.N.Y. 1970).

The Court of Appeals for the Third Circuit, in *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3rd Cir.), *cert. denied*, 407 U.S. 925 (1972), in rejecting the "deathknell" theory of finality for purposes of appeal from denial of class action status, also rejected the argument that ". . . the revised Rule 23 may be seen as an extension by the Supreme Court, acquiesced in by Congress, of the deterrent policies of such statutes as § 4 of the Clayton Act". The Court said:

> "The decision in Snyder v. Harris, *supra*, would seem to indicate that the Court had a much more

> limited goal in mind when it promulgated the revised Rule 23. Allowing the aggregation of claims would have been more consistent with such an intention." 455 F.2d at 623, n. 7.

The Court of Appeals for the Ninth Circuit in *California* v. *Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), *cert. denied* 412 U.S. 908 (1973), refused to permit the State of California to sue as *parens patriae* to recover antitrust injuries allegedly suffered by its citizens. The Court commented critically on the novel theories which have been advanced under Rule 23 and are designed to provide "equivalency recovery". (Compare: "a fund equivalent to the amount of unclaimed damages", *Eisen*, 52 F.R.D. at 265; A217) As to these theories, the Court of Appeals said in *Frito-Lay:*

> "To a greater or lesser degree these theories attempt to utilize class action principles without the class action safeguards so carefully worked out by the drafters." 474 F.2d at 777, n. 11.

Contrary to the District Court's assertion (52 F.R.D. at 264; A217), there is no "respectable precedent" for "fluid class recovery". The three cases cited by Judge Tyler as "respectable precedent" are, as *Eisen III* held (479 F.2d at 1012; A357-358), distinguishable and do not support a "fluid class recovery" in this case.

Bebchick v. *Public Utilities Commission*, 318 F.2d 187 (D.C. Cir. 1963), was neither a class action nor an antitrust action, but rather involved review of a rate determination by a regulatory agency which reached the courts through review of the agency's rate making as provided

by statute; neither the names nor addresses of any injured parties could be determined.

The *Drug Cases* (*State of West Virginia* v. *Chas. Pfizer & Co., Inc.*), 314 F.Supp. 710 (S.D.N.Y. 1970), involved the distribution of a fund created by a settlement of the action which included as an agreed term the method of distribution and had as its objective total peace in regard to all possible claimants; there was no judgment against defendants for the total damages sustained by the class. Judicial approval of the formula and method adopted by the parties, including the ficticious "assignment theory", does not empower the judiciary to force that method on unwilling litigants.

Daar v. *Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732 (1967), did not arise under Federal Rule 23, nor the anti-trust laws, nor the Exchange Act, and the California Court had already held that each class member would have to come forward at an appropriate time and prove his individual damages. 67 Cal.2d at 706; 433 P.2d at 740. Thus, *Daar*, which was subsequently settled, holds that although a court appearance by class members was not necessary to recover full damages, the filing and proving of individual claims would be and is necessary. This view is supported by *Vasquez* v. *Superior Court of San Joaquin County*, 4 Cal.3rd 800, 484 P.2d 964 (1971), in which *Daar* was referred to as follows:

> "*Daar* makes it clear that although ultimately each class member will be required in some manner to establish his individual damages this circumstance does not preclude the maintenance of the suit as a class action." 484 P.2d at 973. (footnote omitted)

Other cases cited anew in plaintiff's brief to this Court are equally inapposite or distinguishable.[13]

Plaintiff cites (Br. 46-47, n. 26) *In Re Western Liquid Asphalt Cases*, 1973 CCH Trade Cases ¶ 74,733 (9 Cir. 1973), apparently to support the proposition "that the class alone is in a position to make sure that the defendants do not 'retain the fruits of their illegality.'" First, the *Western Liquid Asphalt Cases* are not and have never been class actions. Secondly, plaintiff has quoted, out of context, a portion of that case which, if taken in its entirety, supports defendants' position that the fluid recovery theory is contrary to Section 4 of the Clayton Act. As supportive of the position that the District Court had the power to create a "fluid class recovery" under the antitrust laws, plaintiff argues in footnote 26 (Br. 46-47) that courts "are able to fashion relief to the end that 'there be no hiatus in the enforcement' of the antitrust law." However, if that partial quotation is placed in context, it becomes very clear that the Court of Appeals for the Ninth Circuit was supporting defendants' contention that no one can recover under Section 4 of the Clayton Act who cannot demonstrate injury in his business or property:

> "The antitrust laws are to be construed so as to achieve the broad goals which Congress intended to effectuate. [citation omitted] One such policy goal is

13. Plaintiff's quotation (Br. 44) of one line from the Chief Justice's "Report on the Federal Judicial Branch—1973," 59 A.B.A.J. 1125, 1128 (October 1973), is equally misplaced. The thrust of the Report was how properly to deal with the increasing caseload of the courts. Adoption of plaintiff's fluid class recovery concept can only exacerbate that problem by generating a flood of mass consumer class actions in the federal courts, while "[t]he problem is really one for solution by the Congress". 479 F.2d at 1019; A373.

> *that there be no hiatus in the enforcement of* these laws. Each individual who is injured may sue. [citation omitted] Thus, while we should not impose multiple liability upon defendants, nor give recovery to uninjured plaintiffs, neither should we bar recovery to those who can demonstrate that they bore the burden of the violation". (at p. 95,220) (emphasis added to indicate source of plaintiff's quotation)

Prior to the second statement from the *Asphalt* cases which plaintiff quotes ("to permit so large a fish to escape the nets is unthinkable"), the Court of Appeals specifically distinguished the *Western Liquid Asphalt Cases* from mass consumer class actions such as *Eisen*:

> "*We do not have a case of consumers who have only a miniscule interest in the outcome of the litigation.* Instead, appellants are a large number of public consumers of liquid asphalt, who allege that illegal overcharges by appellees resulted in unlawfully high prices to them, for about three million tons of asphalt purchased in some 37,000 contracts. To permit so large a fish to escape the nets is unthinkable". (at p. 95,219) (emphasis added)

Plaintiff cites several other cases (Br. 48) as supporting the proposition that:

> ". . . a fund equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the court until such time as the fund is depleted."

The cases do not support that proposition. In *Alaska Steamship Co.* v. *Federal Maritime Commission*, 344 F.2d

810 (9th Cir. 1965), no fund was involved, but the Federal Maritime Commission directed a future reduction of an excessive rate over which it had regulatory jurisdiction. In *Olson* v. *The County of Sacramento*, 79 Cal.Rep. 140 (Cal. Ct. App., 3d Dist. 1969), *Metro Homes, Inc.* v. *City of Warren*, 19 Mich. App. 664 (1969), *leave to appeal denied*, 383 Mich. 761, *cert. denied*, 398 U.S. 959 (1970); *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972) [cited at Br. 44], and *SEC* v. *Golconda Mining Co.*, 327 F.Supp. 257 (S.D.N.Y. 1971) [cited at Br. 46], there was no future reduction of charges involved, but only the distribution of accumulated funds to those injured, a procedure which is conceded by all parties to be unmanageable in this case.[14]

Market Street Railroad Co. v. *Railroad Commission*, 28 Cal.2d 363, 171 P.2d 875 (1946), which is also cited by plaintiff (Br. 48), was not a class action. The case involved an order by the Railroad Commission to reduce fares, to return excess charges to anyone who made a claim, and to turn over the unclaimed fares to the City since it had subsequently acquired the railway. This Court has held that antitrust damages may not be so treated. *State of Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972).

Plaintiff's analogy between shareholder derivative suits and his fluid class recovery scheme (Br. 49) is inapposite. To the extent that shares are transferred during the litigation, the price of the shares to the purchaser reflects the prospects of a potentially advantageous litigation. Thus, the new owner pays for his expectancy and the old owner

14. The same distinction applies to *Dickinson* v. *Burnham*, 147 F. 2d 473 (2d Cir. 1952), cited (p. 5) in the *Amicus* brief of State of California.

is recompensed for his damage. There is no federal statute or decision which awards a recovery to anyone not injured.

The principle of the "fluid class recovery" was specifically rejected in *City of Philadelphia* v. *American Oil Company*, 53 F.R.D. 45 (D.N.J. 1971)[15], after review of the District Court decisions in both *Eisen* and the *Antibiotic Antitrust Actions*.

> "It is readily apparent that no matter how easy it is to establish damages on a class level, if it is extremely difficult or almost impossible to distribute these sums to their rightful recipients, the class is unmanageable." 53 F.R.D. at 72.

Replying to the argument oft-heard in the instant case that in the absence of a class action defendants will be able to keep "illegal" gains, the Court went on to say that the solution to that problem must come from amendment of the antitrust laws and was not to be found in Rule 23:

> "Although this Court recognizes the importance of private antitrust actions to help enforce the antitrust laws, Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L.Ed. 2d 1231 (1968), it is not believed that Rule 23 was intended to permit a redress for all wrongs committed under the antitrust laws.
>
> * * * * *
>
> "This is not to say that guilty conspirators should not be compelled to disgorge their ill-gotten gains.

15. *See also, Illinois* v. *Harper & Row Publishers, Inc.*, 301 F.Supp. 484, 491 (N.D.Ill. 1969); *Brennan* v. *Midwestern United Life* 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); *Kronen-Ins. Co.*, 259 F.Supp. 673, 684 (N.D.Ind. 1966), *aff'd*, 450 F.2d *berg* v. *Hotel Governor Clinton, Inc.*, 41 F.R.D. 42, 45 (S.D.N.Y. 1966); 3B Moore's Federal Practice ¶ 23.45[2], p. 758, N. 29 (2d Ed. 1969).

> The solution of the problem, however, lies not in imposing an increased burden on the federal courts over and above that which may or should normally be expected of judges in the discharge of their judicial duties, but rather in having the antitrust laws or rules amended to alleviate the problem of manageability inherent in class actions wherein millions of members of the consuming public are involved." 53 F.R.D. at 73-74.

Had Congress intended to require defendants found guilty of violating the antitrust laws to give up every penny of illegal gain, it could have done so by requiring them to account for illegal profits. Compare the accounting remedy in patent and trademark actions, 35 U.S.C. § 284 and 15 U.S.C. § 1117. However, as Professor Handler points out:

> "Thus far, that body has wisely refrained from imposing any such needlessly draconian penalty. But if Congress were to pass such a law, at least it would be Congress which would determine what to do with the funds which were collected. Under our political system, it is hardly appropriate to vest the judiciary with discretion as to how monies should best be spent in the public interest." Handler, *supra*, at page 774.

And, in this case, the public was amply protected by the S.E.C. which, with full knowledge beforehand, specifically approved the odd-lot differential here attacked as illegal.

B. Section 16 of the Clayton Act provides no authority for a "fluid class recovery".

Plaintiff argues (Br. 51-52) that there is authority for a "fluid recovery" because the complaint contains a prayer for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26, and injunctive relief is an equitable remedy. The argument cannot survive analysis.

The injunctive relief prayed for in the complaint is a judgment:

> "D. Enjoining Carlisle & Jacquelin and DeCoppet & Doremus from any further violations of the Sherman Antitrust Act, §§ 1 and 2, and from collecting any further excessive differentials." A26.

Section 16 of the Clayton Act authorizes injunctive relief to prevent

> ". . . threatened loss or damage by a violation of the anti-trust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate . . ." (text of Section 16 is reprinted at Pl. Br. 57-58).

The problems with plaintiff's argument are obvious. He has not requested a "fluid recovery" in his complaint. The differential of the 1962-66 period has been changed twice under S.E.C. supervision, in 1966 pursuant to a Section 19 (b) request. (Ex. C at the preliminary hearing) The possibility of defendants Carlisle & Jacquelin and DeCoppet & Doremus violating Sections 1 or 2 of the Sherman Act was removed when these two firms merged in 1969 with the consent of the Department of Justice. (Letter dated September 17, 1969 to Hamer Budge, S.E.C. Chairman, from Richard W. McLaren, Assistant Attorney General, defendant's Exhibit D at the preliminary hearing). In short, the prayer for injunctive relief pleaded in the complaint has long been moot.

Furthermore, the provisions of Section 16 of the Clayton Act are not applicable to the "restitution of illegal exactions" (Pl. Br. 52), as plaintiff calls his "fluid recovery." Such restitutions, of course, would not constitute "threatened loss or damage".

Plaintiff attempts to analogize his "fluid recovery" theory to a restitution order and relies on an Emergency Price Control Act case, *Porter* v. *Warren Holding Co.*, 328 U.S. 395 (1946) (action by Administrator to compel return of rent overcharges to those individuals who paid them). Plaintiff fails to cite a single case allowing any money recovery, fluid or otherwise, under Section 16 of the Clayton Act. He rests his contention on an alleged principle of equity, in disregard of this Court's specific instruction that Section 16

> ". . . does not go further in terms than to give an injunction to private persons against threatened loss." *Fleitmann* v. *Welsbach Co.*, 240 U.S. 27, 29 (1916).

This Court's interpretation of Section 16 was strictly adhered to in *Decorative Stone Co.* v. *Building Trades Council of Westchester County*, 23 F.2d 426 (2d Cir.), *cert. denied*, 277 U.S. 594 (1928), where the Court, relying on *Fleitmann*, held that:

> "The right to equitable relief against threatened loss provided by section 16 cannot be interpreted broadly enough to authorize the court, as incidental to its injunction, to award treble damages for past violations of the antitrust laws." 23 F.2d at 428.

C. The "fluid class recovery" is contrary to the requirements for recovery under Section 6 of the Exchange Act.

Recovery is sought against the Exchange in the third cause of action for the alleged failure of the Exchange to fulfill its regulatory duty under Sections 6 and 19(a) of the Securities Exchange Act of 1934. In his brief to this Court (Br. 49), plaintiff attempts to effect a *de facto* amendment of his complaint by arguing that the "[l]iability of the Exchange is predicated on federal common law . . .". Compare paragraphs 21 and 27 of the complaint (A24-25):

> "21. That this third cause of action arises under the Securities Exchange Act of 1934, §§ 6(b), 6(d), and 19(a), 15 U.S.C. §§ 78f(b), 78f(d), and 78s(a)."
>
> * * * * *
>
> "27. That notwithstanding the aforesaid statutory provisions, said defendant New York Stock Exchange, aware of the conduct of said defendants Carlisle & Jacquelin and DeCoppet & Doremus, has failed and refused to take any action preventing said defendants Carlisle & Jacquelin and DeCoppet & Doremus from imposing the aforesaid differential on plaintiff and those represented by plaintiff."

There is no private right of action provided in either Section 6 or 19(a) of the Exchange Act. However, the Court of Appeals for the Second Circuit in *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), held that Congress had intended there be a private action based on Section 6 of the Exchange Act to enforce the statutory duties imposed upon exchanges.

In *Baird*, the Court ruled that recovery could not be awarded because plaintiffs had failed to show damages

resulting from the Exchange's inaction. It is clear both from the majority opinion of the Court in *Baird* v. *Franklin* and Judge Clark's dissenting opinion that recovery under Section 6 must must be compensatory and is only obtainable upon a showing of injury.

> "Granted a right of action in plaintiffs, then, the final question is as to damages and whether the Exchange's breach of duty was a proximate cause of plaintiffs' losses." 141 F.2d at 245.

The principles of the *Baird* decision have been followed in all succeeding decisions on Section 6 liability. See, *e.g.*, *Butterman* v. *Walston & Co.*, 387 F.2d 822 (7th Cir. 1967), *cert. denied*, 391 U.S. 913 (1969) and *Pettit* v. *American Stock Exchange*, 217 F.Supp. 21 (S.D.N.Y. 1963).

Plaintiff cites *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964) and *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) to support the position that "federal courts may use any available remedy to make good the wrong done." However, the remedy requested by plaintiff is not "available" under Section 6 of the Exchange Act, which has been interpreted to allow damages only to those injured (see *Baird* v. *Franklin*, *supra*). The fact that plaintiff brings this suit on behalf of a class under procedural Rule 23 cannot effect a change in the substantive legal principles under Section 6 of the Exchange Act. *Snyder* v. *Harris*, 394 U.S. 332 (1969).

Neither *Borak* nor *Bivens* involved an attempt to obtain substantive change through interpretation of a procedural rule. It is generally accepted that where the court does

imply a private remedy under a statute "it is acting to further the general purpose which it finds *in the legislation* . . ." RESTATEMENT (SECOND) OF TORTS § 286, comment d (1965). (emphasis added) Plaintiff is asking this Court not to interpret legislation, but to change long recognized principles of substantive law merely to permit plaintiff to maintain this action as a class action under Rule 23.

D. The proposed "fluid class recovery" intrudes upon the exclusive jurisdiction of the Securities and Exchange Commission.

The "fluid class recovery" proposed by plaintiff and adopted by the District Court would require reduction of the odd-lot differential *in futuro*. However, under Sections 19(b)(9) and (11) of the Exchange Act the S.E.C. has exclusive jurisdiction over Exchange rules and practices fixing "reasonable rates of commission, interest, listing, and other charges" and relating to "odd-lot purchases and sales", subject only to review by a United States Court of Appeals. 15 U.S.C. §§ 78(s)(b)(9), (11); § 78(y). See also Section 11(b) of the Exchange Act, 15 U.S.C. § 78k(b), dealing with S.E.C. and exchange regulation of odd-lot trading.

As of July 1, 1966, the S.E.C., acting pursuant to its authority under Section 19(b)(9), requested the Exchange to enact through its rules specific new limits for the odd-lot differential and the Exchange did so. (See Ex. C at the preliminary hearing.) The Exchange's further 1972 reduction in the differential (see Note 8, *supra* at p. 15) was prefiled with the S.E.C. as required under its Rule 17a-8, 17 CFR § 240.17a-8.

An S.E.C. order fixing rates of commission under the Exchange Act may be reviewed only by a Court of Appeals under Section 25(a) of the Act, 15 U.S.C. § 78(y). That section provides the exclusive method of judicial review for S.E.C. orders under that Act. *Securities and Exchange Commission* v. *Andrews*, 88 F.2d 441, 442 (2d Cir. 1937); *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission*, 93 F.2d 236, 241 (D.C. Cir. 1937). Section 25(a) specifically recognizes the expertise of the S.E.C. by providing that its findings of fact are conclusive if supported by substantial evidence. Accordingly, it is plain that Congress did not intend that the judiciary should be free to interfere with the S.E.C.'s exercise of its statutory powers over the odd-lot differential. This was an important consideration to the Court of Appeals in *Eisen III* in disapproving a "fluid class recovery." 479 F.2d 1011; A355-356. It is a consideration with which plaintiff does not deal.

In *Robert W. Stark, Jr., Inc.* v. *New York Stock Exchange, Inc.*, 346 F.Supp. 217 (S.D.N.Y.), *aff'd* 466 F.2d 743 (2d Cir. 1972), the Court declined to enjoin the Exchange from expelling a member firm for violation of the Exchange's rule on institutional membership. One reason for the Court's reluctance to interfere was that the S.E.C. had indicated its approval of the Exchange's enforcement of the rule and had indicated that it was planning to suggest new rules having, in relevant part, the same effect as the Exchange's rule. The Court then said:

> "This Court considers that the rule making power of the SEC as granted to it by § 6d of the 1934 Act, and § 19b(9) (10) and (13) thereof, empower the SEC to effectuate the establishment of reasonable

> rules covering the underlying problem of the access by institutional investors to the national exchanges as members, or parents of member firms. . . . This Court concludes that there is adequate power in the SEC to take all steps necessary with respect to the access of institutional investors to the NYSE and further believes that this Court should take no step in private litigation which might in any way prejudice the effectiveness of such a scheme, or create any grandfather rights for plaintiffs, or otherwise impair by implication or other, the full and complete right and power of the SEC to do the regulatory work for which it was constituted, in an area of market action which cries out for some rational plan." 346 F.Supp. at 228.

In *Far East Conference* v. *United States*, 342 U.S. 570 (1952), this Court gave classic expression to the long-established principles of judicial restraint in such cases:

> ". . . in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." at 574-575.

See also *Chicago Mercantile Exchange* v. *Deaktor*, CCH Trade Reg. Rep. ¶ 74,806 (U.S. Sup. Ct. December 3, 1973) and *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973).

Following this Court's instruction in *Far East Conference*, the United States District Court for the Southern District of New York on December 12, 1973 refused a mandatory injunction to compel the Exchange to disclose the names of member firms in financial difficulty. *Investors Protective Association* v. *New York Stock Exchange*, 73 Civ. 2823 (S.D.N.Y. 1973). The Court noted that if the plaintiff wished to influence or change Exchange rules or policy, his remedy was under Section 19(b) of the Exchange Act and the Administrative Procedure Act, § 4(d), 5 U.S.C. § 553(c), with review available under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702. The Court said:

> "The *Far East* rule has been applied in this circuit in cases in which direct court review of plaintiffs' claims would have interfered with the operation of the SEC's regulatory authority under the Exchange Act. *United Gas Corp.* v. *Pennzoil Co.*, 248 F.Supp. 449, 454 (S.D.N.Y. 1965), *aff'd*, 354 F.2d 1002 (2d Cir. 1965); *Kroese* v. *New York Stock Exchange*, 227 F.Supp. 519, 521 (S.D.N.Y. 1964); see also, *Robert W. Stark, Jr. Inc.* v. *New York Stock Exchange, Inc.*, 346 F.Supp. 217, 228 (S.D.N.Y.), *aff'd*, 446 F.2d 743 (2d Cir. 1972)."

It is no answer to comment, as the District Court here did (52 F.R.D. at 265; A218), that administration of the "fluid class recovery" "might properly be done under S.E.C. supervision or at least with S.E.C. approval." The point is that the determination of a proper rate should be left to

the S.E.C. subject to review by a Court of Appeals and not determined in a private treble damage action in a District Court. The protection or benefit accorded purchasers and sellers of odd-lots lies in the determination of a proper odd-lot rate, and Congress has entrusted that function to the S.E.C. Thus, plaintiff's "fluid class recovery" theory is not only in conflict with the Exchange Act, but would undercut the scheme of protection for odd-lot investors intended by Congress.

III

The notice prescribed by the District Court does not meet the standards of due process and Rule 23.

In its initial opinion, the District Court correctly held that "both the Rule and concepts of due process require individual notice for the class members who can be identified and notice amounting to more than a 'mere gesture' for those who cannot be identified." 41 F.R.D. at 151; A101. In *Eisen II*, the Court of Appeals agreed. 391 F.2d at 568-570; A129-132.

As a result of the evidentiary hearings directed by *Eisen II*, the District Court found that 2,250,000 of the class members can be identified by simply running computer tapes (Findings of Fact 5, 9, 10; 52 F.R.D. at 257-258; A201-204). Moreover, defendants had stipulated that "[s]uch names and addresses will be made available (if plaintiff proceeds to give notice by individual mailing to such names and addresses) by defendants at their expense in the first instance with ultimate costs to abide the event, with court process under an appropriate order or orders." (A184-

185).[16] Then, however, despite this finding and stipulation, the Court outlined a notice program in which individual notice would be sent only to 2,000 class members who had 10 or more odd-lot transactions and 5,000 additional class members selected at random. The identification of these individuals and their names and addresses would be obtained from the computer tapes. 52 F.R.D. 267; A222-223. Additionally, notice would be sent to member firms of the Exchange and banks with large trust departments,[17] and a one-quarter page notice would be published twice in five newspapers in three cities. 52 F.R.D. at 267-268; A221-223.

The District Court's rationale for its limited notice program was that due process and Rule 23(c)(2) did not

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16. For the first time, plaintiff contends that it is not "reasonable effort" for defendants to turn over the 2,250,000 names and addresses from the computer tapes (Br. 34). No court below so found. Compare finding No. 5 with finding No. 7, 52 F.R.D. at 257; A201-202. Compare plaintiff's readiness to assert that the action is manageable because 56% of the transactions (not merely names and addresses) are on these same computer tapes. (Pl. Br. 43) Compare the reliance placed upon the computer tapes by the District Court's notice program, *infra*, to obtain both names and addresses and frequency of transaction data.

17. The difficulties likely to be encountered as a result of reliance upon commercial banks were discussed by Judge Pollack in *Schaffner* v. *Chemical Bank*, 339 F.Supp. 329 (S.D.N.Y. 1972):

> ". . . individual notice to the income beneficiaries and remaindermen of the modern day trusts presents enormous problems. Identification of the beneficiaries of a continuing personal trust while possible is often a massive task. Much more is involved than the mere examination of a trust instrument to disclose the names, let alone the locations, of the vested and contingent remaindermen. All these would reasonably be entitled to notice since they are more the interested parties than are the income beneficiaries by reason of the fact that the principal of the trust would probably be charged with the expenses or receive any damages." At 335.

require individual notice to the 2,250,000 identifiable class members "[a]lthough the argument has some merits." 52 F.R.D. at 267; A222. As the Court of Appeals held in *Eisen III* (470 F.2d 1015; A363-364), the District Court's failure to direct notice to all identifiable class members was in conflict with the statement of the Advisory Committee that "[t]his mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject" (39 F.R.D. at 107; 27 sa.), and contravened the Court of Appeals' clear and specific ruling in *Eisen II* that in cases such as this individual notice was required by Rule 23 and due process. 391 F.2d at 568-570; A129-132.

The District Court's error stems from its view that one of the considerations in determining what kind of notice is required by due process and Rule 23(c)(2) is whether "expensive and stringent notice requirements could vitiate the class action device" if the plaintiff is unable to pay the costs of notice. 52 F.R.D. at 266; A221. The District Court here saw its duty as one to insure that this action continued as a class action rather than to insure the due process required by the Constitution and Rule 23. See, *e.g.*, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Clearly that was incorrect. Rules Enabling Act, 28 U.S.C. § 2072; *Snyder* v. *Harris*, 394 U.S. 332 (1969).

One need look only so far as the District Court's own outline of the purpose of notice (52 F.R.D. at 226; A219-221) to conclude that the type of notice necessary to meet due process standards has nothing to do with whether the plaintiff is able to pay the costs of such notice. Furthermore, the type of notice cannot be fairly said to depend upon the

size of the claim. It may be that many persons with small claims will not respond to the notice (see 52 F.R.D. at 266; A220), but an individual's right to withdraw from the case, bring his own claim, or seek to play a role in management of the action cannot be dispensed with on the assumption that his claim is so small that he has no interest in responding to notice.

The requirements of due process have been clearly stated by this Court in *Mullane, supra, Schroeder* v. *City of New York*, 371 U.S. 208 (1962), *Armstrong* v. *Manzo*, 380 U.S. 545 (1965), *New York* v. *New York N.H. & H.R. Co.*, 344 U.S. 293 (1953), and many other cases. In *Mullane*, the Court rejected the use of a published notice with respect to persons whose names and addresses were available, not on the grounds of any potential adverse interest (Pl. Br. 32), but for the following reasons stated by the Court:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
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> * * * * *
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> ". . . [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. at 314-15.

And further:

> "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 339 U.S. at 318.

The Court reaffirmed its *Mullane* holding in *Schroeder* v. *City of New York:*

> "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question. . . . '[N]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice,' and . . . '[i]ts justification is difficult at best'." 371 U.S. at 212-213.

See also *Pennoyer* v. *Neff*, 95 U.S. 714 (1877), where the Court said:

> ". . . [W]here the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form [publication] . . . is ineffectual for any purpose." at 727.

Finally, Rule 23(c)(2) provides that class members are entitled to "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." It is clear from the words of the rule that where identification presents no problem, individual notice is required. The District Court simply ignored the availability of the names and addresses of 2,250,000 class members.[18]

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18. Compare, e.g., *Katz* v. *Carte Blanche Corp.*, 53 F.R.D. 539 (M.D. Pa. 1971) (Truth in Lending Act case; notice by mail ordered to some 600,000 class members whose names and addresses were available from defendants' records); *Buford* v. *American Finance Co.*, 333 F.Supp. 1243 (1971) (Truth in Lending Act; notice by mail would be required to those class members whose names and addresses were available from defendants'

The Court of Appeals in *Eisen II* had cautioned that ". . . we assume that some sort of ritualistic notice in small print on the back pages of a newspaper would in no event suffice." 391 F.2d at 569; A131. Nevertheless, the publication program outlined by the District Court was "ritualistic" because as a practical matter most class members would never see it. The combined circulation of the five newspapers in which the District Court would order publication of notice is only 3,905,297. 52 F.R.D. at 274; A236. The Court justified its publication program on the ground that a large portion of shareholders in public corporations reside in New York and California. There were 4,947,000 shareholders in New York and California, but there were 15,173,000 shareholders elsewhere. 52 F.R.D. at 273; A234-235. Presumably, the distribution of odd-lot purchasers and sellers is comparable. Therefore, there is no chance that the notice could be seen by almost three-fourths of the members of the class. As the Court of Appeals held in *Eisen III*, notice by publication to such a dispersed and unidentifiable class is "a farce" (479 F.2d

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records); *Berland* v. *Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969) (security fraud; individual notice by mail given to class members who were identifiable from available records); *Herbst* v. *Able*, 47 F.R.D. 11 (S.D.N.Y. 1969) (security fraud; five related class actions; notice by mail ordered in four of the actions; notice by publication in the fifth only because the class members could not be identified); *Illinois* v. *Harper & Row Publishers, Inc.*, 301 F.Supp. 484 (N.D. Ill. 1969) (antitrust class action on behalf of several classes of public libraries, school districts, and boards of education; notice by mail required); *Minnesota* v. *United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968) (antitrust class action on behalf of various governmental entities and agencies; notice by mail given); *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D.N.Y. 1966) (security fraud; notice by mail to each security holder); *Brennan* v. *Midwestern United Life Insurance Co.*, 259 F.Supp. 673 (N.D. Ind. 1966), *aff'd*, 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972) (security fraud; notice by mail ordered).

at 1017; A368-369), or, in the words of the District Court, a "mere gesture". 41 F.R.D. at 151; A101.

Plaintiff suggests (Br. 30-31), citing *Hansberry* v. *Lee*, 311 U.S. 32 (1940), that if there is adequate representation in a class action, due process is met without the individual notice required by such cases as *Mullane* and *Schroeder* and Rule 23 itself. Plaintiff is incorrect. Both the Rule and due process require adequate representation *and* notice, which must be individual when the names and addresses of the parties to be bound in the litigation are reasonably available.

Plaintiff misquotes (Br. 30-31) Judge Oakes as saying that individual notice to identifiable class members is unnecessary. Judge Oakes' statement was limited "to class members *who cannot be identified.*" 479 F.2d at 1024; A383. In addition, as *Eisen III* held, under the circumstances of this case notice by publication would not be consistent with due process.

Plaintiff contends (Br. 31-32) that it is unnecessary to give the individual notice required by Rule 23 and due process because the statute of limitations has run. The suggestion ignores considerable authority indicating that the pendency of a class action tolls the statute of limitations. See *State of Utah* v. *American Pipe & Construction Co.*, 473 F.2d 580 (9th Cir. 1972), *cert. granted*, 411 U.S. 963 (1973); *Lamb* v. *United Security Life Company*, 1971-72 Fed. Sec.L.Rep. ¶ 93,489 (S.D. Iowa 1972) (cited by plaintiff at Br. 39); *McCausland* v. *Shareholders Management Co.*, 52 F.R.D. 521 (S.D.N.Y. 1971); and *Philadelphia Electric Company* v. *Anaconda American Brass Company*, 43 F.R.D. 452, 461 (E.D. Pa 1968). Further-

more, many alleged class members may wish to assist in determining the course of the action, and others may prefer to opt out to avoid discovery, the possibility of assessment of costs, or simply because they are not litigious. These members are entitled to such options, and Rule 23 provides them through the requirement of notice.

This opportunity to participate and have a real voice in the strategy and management of a litigation in which he will be bound cannot be denied a class member, whether his claim be small, or whether the running of the statute of limitations has effectively left him no other forum.[19] Because of the failure to send individual notice to those class members whose names and addresses were ascertainable, the Court of Appeals for the Third Circuit in *Greenfield* v. *Villagers Industries, Inc.*, 483 F.2d 824 (3d Cir. 1973), citing *Eisen III* and the decisions of this Court on notice discussed above, reversed the District Court and held void all orders below effectuating a settlement and distribution of a settlement fund, saying:

> "A procedure such as the class action, which has a formidable, if not irretrievable, effect on substantive rights, can comport with constitutional standards of due process only if there is a maximum opportunity for notice to the absentee class member, *i.e.*, '[T]he best notice practicable under the circumstances including individual notice . . . .'
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> "Given that class action procedures are conceptualized as an exception to the general rule that only parties to a lawsuit are legally bound by a

19. For this reason alone the Court of Appeals was correct in holding that due process required some form of notice in Rule 23(b)(1) and (2) actions, although not necessarily individual notice. 391 F.2d at 564; A122.

> final judgment, and that interested parties normally have a real voice in the strategy and management of the litigation, the procedure can be tolerated, if not completely justified, only if there is fealty to both the spirit and the letter of the procedural rules, especially those relating to notice.
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> * * * * *
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> "Where names and addresses of members of the class are easily ascertainable, requirements of due process would dictate that the 'best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort,' Rule 23(c)(2), would be individual notice." 483 F.2d at 831-832. (footnote omitted)

Plaintiff argues (Br. 35-38) that the Court of Appeals in *Eisen III* improperly failed to consider alternatives "for the purpose of satisfying notice requirements". One alternative plaintiff suggests is division of the class into subclasses. However, the complaint defined the class which plaintiff sought to represent, and plaintiff never advocated subclasses before the District Court. It is not for courts of appeal to recast a plaintiff's pleading.

Another alternative plaintiff suggests (Br. 36) is to call the action a Rule 23(b)(1) or (2) action through the stage of determination of liability, and then, if the defendants are found liable, convert the action into a Rule 23(b)(3) action. That would not work.

In *Eisen II*, the Court of Appeals correctly held (391 F.2d at 564; A121): (a) there was no danger of inconsistent or varying adjudications because, as plaintiff had argued, it would be too expensive for different class members to

bring separate suits (thus precluding a Rule 23(b)(1) action); and (b) this action was not an action predominantly or exclusively brought for injunctive or declaratory relief (thus negating a Rule 23(b)(2) action). See Advisory Committee's Note, 39 F.R.D. at 102; 17-18 sa. Money damages are what this suit is all about. The prayer for injunctive relief became moot in 1966 when the S.E.C. directed its 19(b) request to the Exchange to institute a new odd-lot differential. Ex. C at the preliminary hearing; see *Eisen III*, 479 F.2d 1011, n.10; A356.

Another problem with plaintiff's scheme is that if defendants are found not liable and no notice has been given to absent class members, defendants would have attained a hollow victory indeed because no one would be bound but Mr. Eisen. Rule 23(c)(3). In such a circumstance, defendants would have been put to untold expense[20] to litigate a $70 claim which plaintiff advises would not have been brought but as a class action; yet defendants would never be able to secure the *res judicata* advantages which Rule 23 provides for a defendant who is forced to suffer a massive class action and who prevails.[21] The end result would be the same as the one-way intervention which was so highly criticized under the old Rule and which the amendments

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20. Defendants' taxable costs on the *Eisen III* appeal alone were $11,596.74 (A389-390), and that is only the tip of the iceberg resulting from over seven years of litigation. See A328-345.

21. Contrary to the Brief *Amicus Curiae* of the American Civil Liberties Union (at 6-10), such perversion of the Rule is more than adequate to give defendants "standing" to object. Defendants' attorneys also have such "standing" as officers of the Court, which is charged by Rule 23 with protection of the rights of absent class members. The need for *res judicata* effect of a decision on liability favorable to defendants is not considered either by plaintiff or the Briefs *Amicus Curiae* of Public Citizen and Consumers Union of United States, Inc., at 7-18, and the State of Alabama, *et al*, at 14-21.

were expressly intended to change. See *Richland* v. *Cheatham*, 272 F.Supp. 148, 155-156 (S.D.N.Y. 1967); Advisory Committee Note, 39 F.R.D. at 105; 24 sa.

IV

Defendants' Fifth and Seventh Amendment rights were violated and the substantive law misapplied as a result of the District Court's preliminary hearing.

A. Requiring defendants to pay the cost of notice was improper.

The Court of Appeals in *Eisen II* ruled in no uncertain terms that

> "The task of furnishing notice to the class members *in such a case as this must* rest upon the representative party when he is plaintiff." 391 F.2d at 568; A129. (footnote omitted; emphasis added)[22]

The Court's ruling was consistent with the Revisers' intention for procedure under Rule 23. Professor Kaplan, Reporter to the Advisory Committee on Civil Rules, has stated:

> "It may be presumed that, when the method of notification has been decided upon, plaintiffs ordinarily will be asked to attend to the mechanics of publication and distribution and will initially bear the expense." *Continuing Work of the Civil Committee: 1966 Amendments to FRCP*(1), 81 Harv. L. Rev. 356, 398 n.157 (1967)

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22. Accord, *Akron* v. *Laub Baking Co.*, 1972 Trade Cases ¶ 73,930, at p. 91,889 (N.D. Ohio 1972); *Buford* v. *American Finance Co., supra*, 333 F.Supp. at 1250, 1252; *Cusick* v. *N.V. Nederlandsche Combinatie Voor Chemische Industrie*, 317 F.Supp. 1022, 1025 (E.D. Pa. 1970); *Richland* v. *Cheatham*, 272 F.Supp. 148, 156 (S.D.N.Y. 1967); 3B Moore's Federal Practice, ¶ 23.55 at p. 23-1154.

Notwithstanding the Court of Appeals' clear ruling, the District Court's opinion of April 4, 1972 imposed 90% of the costs of Rule 23(c)(2) notice ($19,548) on defendants. In *Eisen III*, the Court of Appeals adhered to the principle that "in this type of case" the representative plaintiff must bear the first cost of notice. 479 F.2d at 1009; A351. The Court pointed out that this was a suit to recover money damages under Section 4 of the Clayton Act and Section 6 of the Exchange Act—not a shareholder's derivative action or one seeking a refund against a public utility corporation where notice could be given in the customer's next monthly statement. The Court was careful to state that there may be

> ". . . other similar examples of class actions in which, depending on the circumstances of particular cases, courts might find justification for holding that a representative plaintiff was not obligated to defray the cost of giving the notices required by amended Rule 23. We do not attempt any enumeration." *Id.*, n. 5.

Many of the briefs *amici* overlook this careful limitation in the Court of Appeals decision.

In a case such as this, forcing defendants to finance a lawsuit against themselves (on behalf of people who have shown no wish to sue) is a matter of substance, which cannot be authorized by any procedural rule.

In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court held that the requirement of a cost bond was substantive and not procedural.

> "However, it creates a new liability where none existed before, for it makes a stockholder who in-

> stitutes a derivative action liable for the expense to which he puts the corporation and other defendants, if he does not make good his claims. Such liability is not usual and it goes beyond payment of what we know as 'costs'. If all the Act did was to create this liability, it would clearly be substantive. But this new liability would be without meaning and value in many cases if it resulted in nothing but a judgment for expenses at or after the end of the case. Therefore, a procedure is prescribed by which the liability is insured by entitling the corporate defendant to a bond of indemnity before the outlay is incurred. We do not think a statute which so conditions the stockholder's action can be disregarded by the federal court as a mere procedural device." at 555-556.

There is absolutely no authority under Section 4 of the Clayton Act or Section 6 of the Exchange Act for assessing defendants with the cost of notice to a class which plaintiff purports to represent adequately. In *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), attorneys' fees were awarded only after liability had been determined. The Court was careful to limit such awards to cases "of this type [a suit by shareholders to set aside a merger]." 396 U.S. at 390.

In *Cusick* v. *N.V. Nederlandsche Combinatie Voor Chemische Industrie*, 317 F.Supp. 1022 (E.D. Pa. 1970), the Court stated:

> "There is another difficulty as well. In one of the memoranda submitted to us for consideration on this motion, the plaintiff seems to intimate that he is only prepared to contribute approximately $300.00 to pay for notice to the other members of the class he seeks to represent. Regardless of which form of

> notice we ultimately decide is mandated by Rule 23 under the circumstances of this case, it is clear that such notice will cost substantially more than $300.00. At the same time we have concluded that in a case such as this, the expense of furnishing at least the initial notice to class members must fall on the representative party when he is the plaintiff. *Eisen, supra*, 391 F.2d 555 at 568; Richland v. Cheatham, 272 F.Supp. 148 (S.D.N.Y. 1967); Herbst v. Able, 47 F.R.D. 11, 22 (S.D.N.Y. 1969); cf. 3B Moore's Federal Practice, ¶ 23.55 and cases there cited. ('Logically the mechanical and financial burden of giving the notice required by (c)(2) should be borne by the plaintiff as a concomitant of maintaining his class action.') Therefore it is clear that the plaintiff will have to provide substantially more financial support to the case than he now seems willing to offer if he is to be able to adequately represent his class." 317 F.Supp. at 1025. (footnotes omitted)

The *Cusick* Court noted the difference in terms of fairness between imposing the burden of notice on the corporate defendant in a shareholders' derivative suit and imposing that burden on a truly adversarial defendant:

> "The cases cited by the plaintiff in this regard, Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Bragalini v. Biblowitz (S.D.N.Y. 1969) and Berland v. Mack, 48 F.R.D. 121, 132 (S.D.N.Y. 1969) [the same cases relied upon by Judge Tyler; 52 F.R.D. at 269, n.14; A227] are all class actions brought by shareholders of a corporation against the corporation, and therefore clearly distinguishable from cases such as the one before us. In suits brought by shareholders, it may be reasonable to impose the duty of notice on the corporation be-

cause the corporation has a fiduciary duty to its shareholders who after all own the corporation and because, as a practical matter, the corporation makes frequent mailings to shareholders and can easily insert notice of a case pending against it brought in the name of the shareholders. As the Court stated in Berland, 48 F.R.D. at 132:

> "'. . . Where the claim appears to be a meritorious one and defendants desire it be prosecuted through a class action, it does not seem unreasonable to require the corporate defendant to share the cost of notice, particularly in a case where plaintiffs may be able to reimburse the corporation if the claim is dismissed.'
>
> On the other hand, where as here the plaintiffs are numerous, unidentified and have no relations to the defendant other than the purchase of a manufactured good, the imposition cost [sic] of notice on the defendant at an early stage of the case would be highly unfair and raise serious questions of due process." 317 F.Supp. at 1025, n.6.

Because plaintiff had always claimed that he could not pay any more than token costs (A273), it seems plain that should defendants eventually prevail on the merits before a jury, which has been demanded in this action (7 sa), they would never recover the substantial amount of money they were ordered to pay by the District Court.[23] The District Court's order thus amounts to a clear taking of defendants' property in substantial value and in violation of their rights to trial by jury under the Seventh Amendment and to due process under the Fifth Amendment. This alone

23. The $19,548 assessment upon defendants is almost twice the jurisdictional amount required by 28 U.S.C. §§ 1331 and 1332.

was enough for Judge Hays to vote for reversal. 479 F.2d at 1020; A374.

The cases cited by plaintiff (Br. 40) do not support assessment of the cost of notice on defendants.

In *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), the Court regarded the issue on a replevin bond as whether "procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another." 407 U.S. at 80. The deprivation of property permitted by the state statutes was "temporary" and "non-final" (*id.* at 84-5), unlike the deprivation here.

In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), the Court held that Wisconsin's pre-judgment garnishment of wages procedure, which contained no provisions for notice and prior hearing, constituted a violation of due process. The majority did not specify the type of notice or prior hearing it believed would satisfy the requirements of the Fourteenth Amendment. A debtor in Wisconsin who was subject to garnishment could recover his wages after success at trial. Here defendants can never recover the costs of notice should they ultimately prevail on the merits.

In *Farmer* v. *American Arabian Oil Co.*, 285 F.2d 720 (2d Cir. 1960), the Court reversed an order under local Rule 2(b) of the Southern and Eastern Districts of New York requiring an out-of-state plaintiff to file a bond for costs on retrial because the defendant had sought the bond ". . . apparently as a belated trial tactic, four years and four months after action brought". 285 F.2d at 721.

Plaintiff's analogy (Br. 40-41) to the cost of discovery or defense is inapposite. Those costs are traditional and consistent with the adversarial process of litigation—totally different from being required to finance a lawsuit against one's self. What is plain here is that someone, as plaintiff, who warrants that he can adequately represent the class, should also be able to communicate with those he seeks to represent. Put differently, if the class plaintiff seeks to represent is one too large for him to communicate with, then he is not adequate to represent that class. Rule 23(a)(4).

B. The Court of Appeals' disapproval of the preliminary hearing was in accord with the Federal Rules and was necessary to preserve defendants' substantive rights.

Rule 23 does not authorize a preliminary hearing on the merits to determine who is to pay for notice. Such a hearing subverts Rule 23's direction for prompt class action determination and subverts the procedures prescribed by other Federal rules, such as Rules 12 and 56, and the discovery rules. It also subverts defendants' right to trial by jury under the Seventh Amendment.

The Court of Appeals said in *Eisen III*:

> "But neither in amended Rule 23 nor in any other rule do we find provision for any tentative, provisional or other makeshift determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter such as which party is to be required to pay for mailing, publishing or otherwise giving any notice required by law. In most cases the so-called tentative findings and

> conclusions arrived at without the salutary safeguards applicable to all full scale trials on the merits will be extremely prejudicial to one or the other of the parties who bear the brunt of such findings and conclusions, and such prejudice may well be irreparable."
>
> * * * * *
>
> ". . . No provision is made in amended Rule 23 for any such mini, preliminary or other hearings on the merits. It does violence to the whole concept of summary judgment, and cannot be reconciled with the requirement in Rule 23 that 'as soon as practicable after the commencement of the action' the question of class suit *vel non* be decided." 479 F.2d at 1015-1016; A365-367.

The decision below followed the decision of the Fifth Circuit Court of Appeals in *Miller* v. *Mackey International, Inc.*, 452 F.2d 424 (5th Cir. 1971). No other Court of Appeals decision is in conflict. See *Johnson* v. *Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969); *Kahan* v. *Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); *Halverson* v. *Convenient Food Mart, Inc.*, 458 F.2d 927, 932 (7th Cir. 1972). In *Miller*, Judge Wisdom held that the mere possibility that the District Court may have considered the merits on a Rule 23 determination was sufficient reason for reversal:

> "This portion of the order indicates to us that in passing on the propriety of the class action the district judge may have considered whether the petition stated a cause of action or whether Miller would succeed on the merits. This was improper. In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the

merits, but rather whether the requirements of Rule 23 are met.

"The determination whether there is a proper class does not depend on the existence of a cause of action. A suit may be a proper class action, conforming to Rule 23, and still be dismissed for failure to state a cause of action.

* * * * *

" . . . the Advisory Committee Notes make clear that a district judge is to consider only the specific requirements of sub-divisions (a) and (b) of Rule 23. The Committee stated with respect to sub-division (c) (1) of Rule 23:

" 'In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. *The determination depends in each case on satisfaction of the terms of sub-division (a) and the relevant provisions of sub-division (b).*' " 452 F.2d at 427-428.

See also *Lamb* v. *United Security Life Company*, 1971-72 Fed. Sec. Law Rep. ¶ 93,489 (S.D. Iowa 1972) (also cited by plaintiff at Br. 39), refusing a preliminary hearing on the merits and discussing (at pp. 92,370-92,372) the problems and lack of safeguards inherent in such a hearing.

Plaintiff contends (Br. 40, n.18) that the Court of Appeals for the Fifth Circuit modified its proscription of preliminary hearings on the merits in *Huff* v. *N.D. Cass Company of Alabama*, 17 F.R.Serv.2d 934 (5th Cir. 1973), which was an *in banc* decision. Plaintiff completely misconstrues the Court of Appeals' holding in *Huff* by char-

acterizing that opinion as allowing preliminary hearings *on the merits.*

In *Huff*, the District Court conducted a preliminary evidentiary hearing which led to an appraisal of the merits of plaintiff's individual claim, determined that plaintiff was not a member of the class, and, therefore, could not adequately protect its interests as required by Rule 23(a)(4). The Court of Appeals' ruling on the preliminary hearing stated that "this court is committed to the principle that the standard for determining whether a plaintiff may maintain a class action is not whether he will ultimately prevail on his claim". 17 F.R.Serv.2d at 935, citing *Miller* v. *Mackey*, *supra*. The Court went on to hold that in looking into the *merits* of plaintiff's claim, "the trial court applied an incorrect standard, and its decision must be vacated and the cause remanded for consideration under the correct standard." *id.* The type of inquiry that the Court recognized as proper in the *Huff* case was one relating solely to whether plaintiff meets the requirements of Rule 23(a) and (b) and not one which would assess the likelihood of success on the merits.

C. The District Court misapplied the substantive law.

The Court of Appeals in *Eisen III* vacated the District Court's substantive findings and conclusions at the preliminary hearing (479 F.2d at 1020; A374) and recognized that defendants had advanced cogent arguments for a finding that there was no merit to plaintiff's claims. 479 F.2d at 1012; A359.

The District Court had based its substantive conclusions (54 F.R.D. at 572; A286) on the fact that the Exchange reg-

ulated the differential through settled practice rather than formal rule. Defendants contend that in arriving at these conclusions, the District Court either ignored or misapplied the principles set forth in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Kaplan* v. *Lehman Brothers*, 250 F.Supp. 562 (N.D. Ill. 1966), *aff'd*, 371 F.2d 409 (7th Cir. 1967), *cert. denied*, 389 U.S. 954 (1967); *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971); *United States* v. *Morgan*, 118 F.Supp. 621 (S.D.N.Y. 1953); and *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 727 (1944) in respect to the facts that were placed in the record by defendants at the preliminary hearing. These facts are summarized *supra* at pp. 13-16.

1. ***A per se concept is inapplicable.***

The District Court ruled that plaintiff was likely to carry his burden of showing that defendants "fixed" the differential and that "[u]nder the *per se* rule, once this showing has been made, judgment must follow and the Court need not consider any defenses such as . . . reasonableness . . ." 54 F.R.D. at 571; A284. The District Court moved to judgment too abruptly. Under *Silver*, the determination of the odd-lot differential as required by the Exchange Act cannot be subject to attack under the antitrust laws; even if it were, the rule of reason must be applied.

In *Silver*, *supra*, this Court stated that "[t]he general dimensions of the duty of self-regulation are suggested by § 19(b) of the [Exchange] Act . . ." 373 U.S. at 352-353. Section 19(b)(9) of the Act includes "the fixing of reasonable rates of commission, interest, listing and other

charges" as within the Exchange's duty of self-regulation and § 19(b)(11) places "odd-lot purchases and sales" within such duty. The Court in *Silver* recognized that there was a head-on collision between the Exchange Act and the antitrust laws and considered how that collision should be reconciled.

While acknowledging in *Silver* the S.E.C.'s power to disapprove any rules or practices of a national securities exchange (*Id.* at 357), the Court observed that the S.E.C. did not have jurisdiction " . . to review particular instances of enforcement of exchange rules." *Id.* at 357. It thus ruled that the case presented no conflict between the S.E.C.'s regulatory power and the antitrust laws. The Court stated that a different case for antitrust exemption would be presented "[s]hould review of exchange self-regulation be provided through a vehicle other than the antitrust laws . . ." (*Id.* at 360) and that "particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim." *Id.* at 361. See also *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973); *Hughes Tool Company* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Chicago Mercantile Exchange* v. *Deaktor*, CCH Trade Reg. Rep. ¶ 74,806 (U.S. Sup. Ct., December 3, 1973); and *Haddad* v. *The Crosby Corp.*, Civ. No. 2454-72 (D.C. D.C. December 14, 1973).

The Court of Appeals for the Seventh Circuit in *Kaplan* v. *Lehman Brothers*, *supra*, following the teachings of *Silver*, held that the Exchange's practice of fixing minimum

rates of commission could not be a violation of the antitrust laws because § 19(b)(9) of the Exchange Act empowered the Exchange to fix "reasonable rates of commission," subject to review by the S.E.C.

In its subsequent decision in *Thill Securities Corp.* v. *New York Stock Exchange, supra*, the Seventh Circuit reaffirmed its decision in *Kaplan*, and pointed out that plaintiff Thill was not proceeding on a *per se* theory but was claiming that application of the Exchange's rules against sharing of commissions violated the rule of reason (433 F.2d at 270).

In *Robert W. Stark, Jr., Inc.* v. *New York Stock Exchange, Inc.*, 346 F.Supp. 217 (S.D.N.Y.), *aff'd* 466 F.2d 743 (2d Cir. 1972), the Court found little merit in the claim that the Exchange's rule precluding institutional membership violated the antitrust laws. The Court said:

> "Reasonable rules which fulfill the need for self-regulation of the exchange are *required*. 15 U.S.C. § 78f(b). Since they are an essential part of the statutory scheme, they may, if reasonable and relevant, and fairly administered, be within an implied exception to the antitrust statutes. *Silver* v. *N.Y.S.E.*, 373 U.S. 341 (1963)." at 228.

On December 4, 1973, the United States District Court for the Southern District of New York applied the *Silver* rationale to defeat an antitrust attack on the Exchange's commission rate structure. *Gordon* v. *New York Stock Exchange, Inc.*, CCH Sec. Law Rep. ¶ 94,235 (S.D.N.Y. Dec. 4, 1973). The Court ruled:

> "We hold that this court lacks jurisdiction to entertain an anti-trust attack on the commission

structure of the Exchanges, since the fixing of commissions falls squarely within the congressional policy of exchange self-regulation embodied in the 1934 Act. Since the Act expressly directs the SEC to supervise the 'fixing of reasonable rates of commission' (§ 19(b)(9)), we believe this is the 'different case,' on which *Silver* reserved decision, where review of exchange self-regulation is available 'through a vehicle other than the antitrust laws' (*Silver*, p. 360)." at p. 94, 955.

* * * * *

"Moreover, recent developments in Congress regarding the commission structure support the holding here. The Senate recently rejected amendments to the 1934 Act which would have mandated the elimination of fixed commissions within two years. See 119 Cong. Record, S11385-6, June 18, 1973. It is reasonable to infer from the proposal of these amendments that Congress did not believe fixed commissions were already illegal under the antitrust laws, and, of course, the rejection of the amendments suggests that Congress does not now regard fixed rates as offensive to the Exchange Act or the anti-trust laws." at pp. 94, 957-58.

Here Sections 6 and 19(b) of the Exchange Act obligate the Exchange to exercise its self-regulatory duty to adopt rules or practices governing the differential. The fact that regulation of the odd-lot business and the differential is required by the Exchange Act was confirmed by the S.E.C.'s exercise of its Section 19(b) authority in respect to the multiple trading of odd-lots in 1941 (*In re the Rules of the New York Stock Exchange*, 10 S.E.C. 270) and with respect to the differential in 1966. Section 19(b) expressly includes regulation by both rules "*and practices.*" The District Court

simply ignored the words of the statute when it distinguished between regulation by rule and by practice: ". . . . if the Exchange had exercised its self-regulatory powers by establishing rules in respect to odd-lot differentials, I would assume *arguendo* that review of such rules might be beyond the powers of this court." 54 F.R.D. at 572; A286.

It is indisputable that the very differential here claimed to be a violation of Section 1 of the Sherman Act was implemented after a presentation by the odd-lot defendants to the S.E.C., after a two-day hearing before the S.E.C. held at the request of the Midwest Stock Exchange, and after the S.E.C. recorded in its minutes (Ex. J. at the preliminary hearing) that it had no objection (see *supra* at 14-15). Similar approvals were obtained from the Exchange (*id.*)

In April 1964, the "practice" was called a "rule", so that for half the period for which damages are claimed here, the "rule" that the District Court said *arguendo* would be beyond its review powers existed *de jure* as well as *de facto*. See 54 F.R.D. at 542; A286, and *supra* at 15.

Thus, both the Exchange and the S.E.C. did regulate the differential as required in Section 19(b) of the Exchange Act. If antitrust liability were to be imposed, there would be a "head-on collision" between the Exchange Act and the antitrust laws, and the Exchange Act could not be made to work as Congress wished. Nor could the Exchange Act work if the district courts were to pre-empt the S.E.C.'s judgment in areas of its basic regulatory function by rendering *ad hoc* decisions on rules and practices of general application, such as the differential.

2. *Rule of reason.*

Even if the practice of having a uniform odd-lot differential cannot be said under *Silver* to be exempt from application of the antitrust laws, the District Court was in error in failing to apply the rule of reason as specified in *Silver* (373 U.S. at 360-361; 361-367) and in *United States* v. *Morgan*, 118 F.Supp. 621 (S.D.N.Y. 1953, Medina, J.).

As recognized by Section 19(b) of the Exchange Act, there had to be a uniform odd-lot differential on the Exchange for an orderly market. Historically, there has always been only one differential on all national securities exchanges. All Exchange action and the action by the two odd-lot defendants was undertaken with the full knowledge and participation of the S.E.C. The differential here challenged for the period 1962-1966 was found to have been reasonable after investigation by the Exchange's Special Committee on Odd-lots (Ex. F at the preliminary hearing) and the Price Waterhouse cost study undertaken under the joint auspices of the S.E.C. and the Exchange (Ex. A at the preliminary hearing).

In cases presenting similar historical, economic and practical considerations, the rule of reason has been held applicable. *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231 (1918); *United States* v. *Morgan*, *supra*, at 689-690.

With the fall of plaintiff's premise that defendants are "wrongdoers" and that he is a "private attorney general" seeking to compel return of the "fruits of their illegality", there also falls plaintiff's rationale for violation of substantive and procedural rights to permit this action to be maintained as a class action.

V

Under the applicable law the action cannot be managed as a class action and should be dismissed as such.

It was understandable that in 1968, in view of the newness of amended Rule 23, the majority of the Court of Appeals were reluctant to conclude that this case could not be managed as a class action without a closer look at the facts. Those facts have now been found by the District Court. They show overwhelmingly that the case cannot be managed as a class action with any reasonable relation between recovery and cost, without even considering the overwhelming drain on court and lawyers' time which such an exercise would entail.

All concur that this action cannot be managed as a class action without the "fluid class recovery" invention. The costs of paper work, printing, and postage computed by the District Court bear out plaintiff's concession that this action cannot be managed to distribute money damages. The process of distributing damages will clearly consume any possible recovery by members who file claims. On 1971 cost figures, the District Court estimated that the costs required for "paperwork, printing, postage and publication is $500,000 in round numbers." 52 F.R.D. at 263; A214. The District Court concluded that there might be a larger number of claims in this case than in the *Drug Cases* in which 42,000 individual claims were filed. Even if as many as 50,000 persons filed claims in this case, the average cost per claim would be $10. In *Cherner* v. *Transitron Electronic Corporation*, 201 F.Supp. 934 (D. Mass. 1962), the cost of administering a settlement fund of $5,300,000 to 33,036

claimants found eligible to participate averaged $25.47 per claim, exclusive of attorney's fees. 52 F.R.D. at 259; A205-206. See Stipulation No. 2. A191-193.

The average damages alleged to have been sustained by each class member in this action can be estimated at between $3.89 and $20.98. During the relevant period, the average odd-lot differential was $5.18 and each odd-lot trader averaged 5 transactions. 52 F.R.D. at 257; A201. Minimum damages estimated by the District Court were 5% of the differential paid. Maximum damages estimated by the District Court were about 3 times the minimum damages, or 15%. However, plaintiff estimated his damages at 27% of the differential paid. 52 F.R.D. at 265 n.8; A218. Thus, $5.18 times 5 times .05 times 3 equals $3.89. 27% of the total differential paid multiplied by 3 equals $20.98.

The average cost for processing individual claims will grow. For example, if the District Court's notice program is inadequate, the cost of notice will be substantially greater. Inflation has already had its effect on costs, for the District Court's estimate of the cost of notice was based on a 6 cent first class mailing cost. The District Court's view that "claims" could be processed for $200,000 was based on the *Drug Cases* (52 F.R.D. at 263; A214), and hence its estimate is probably much too low because in the *Drug Cases* claims were processed by plaintiffs' attorney outside of an adversarial proceeding. Here defendants will have and exercise the right to contest claims. In short, the average cost per claimant will probably be much greater than $10, but the average damages may be as low as $3.89 per claimant.

The mathematics of this case bear out Chief Judge Augelli's view in *City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45, 73 (D. N.J. 1971), that "Rule 23 was [not] intended to permit a redress for all wrongs committed under the antitrust laws," and the reluctance of the Court of Appeals in *Eisen II* "to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them." 391 F.2d at 567; A126.

Many courts have recognized the inherent impossibility of managing a class action involving millions of persons with small claims scattered over a wide geographic area.[24]

Illinois Bell Telephone Co. v. *Slattery*, 102 F.2d 58 (7th Cir.), *cert. denied*, 307 U.S. 648 (1939), proffered by plaintiff to show that this action can be managed as a class

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24. See *Reinisch* v. *New York Stock Exchange*, 52 F.R.D. 561 (S.D. N.Y. 1971) (rejecting class of all traders on the New York Stock Exchange), *appeal dismissed* (2d Cir. Dk. No. 71-1759, 1971) (not officially reported); *United Egg Producers* v. *Bauer Int'l Corp.*, 311 F.Supp. 1375 (S.D.N.Y. 1970) (rejecting class of all egg consumers in the United States); *Ward* v. *Luttrell*, 292 F.Supp. 165 (E.D. La. 1968) (rejecting class of Louisiana working women); *Schaffner* v. *Chemical Bank*, 339 F.Supp. 329 (S.D.N.Y. 1972) (rejecting class of "all persons and institutions who are or have been beneficiaries of any trust or trusts of which defendant is trustee and for whose account defendant executes securities transactions" at p. 330); *City of Philadelphia* v. *American Oil Co., supra* (rejecting class of all non-governmental gasoline purchasers in Pennsylvania, Delaware and New Jersey); *Hackett* v. *General Host Corp.*, Civil No. 70-534 (E.D. Pa. 1970) (rejecting class of all consumers of bread in Philadelphia area), *appeal dismissed*, 455 F.2d 618 (3d Cir. 1972), *cert. denied*, 407 U.S. 925 (1972); *State of Hawaii* v. *Standard Oil Co.*, 301 F.Supp. 982 (D. Hawaii 1969), *rev'd*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972) (rejecting class of all gasoline purchasers in Hawaii); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 43 F.R.D. 452, 461 (E.D. Pa. 1968). ("The problems of management of a class action embracing as plaintiffs, potentially, all state and local governments in the United States, are so plainly insurmountable as to require no further comment.")

action, actually proves the opposite. As Chief Judge Lumbard pointed out in his dissent in *Eisen II* (391 F.2d at 571; A135), the telephone company " . . . agreed to undertake the task of making refunds and to assume the costs of the distribution." (See also 102 F.2d at 61) It employed as many as 2,000 people at one time, incurred expenses of $2,700,000 to distribute $17,000,000 to only slightly more than one million people, and accumulated 110 tons of records relating to the litigation and refunds. (A193-194) Inflation would have more than doubled the cost of similar efforts today, without even considering, as Chief Judge Lumbard pointed out (319 F.2d at 571; A135), that the company already had set aside the fund, could easily calculate the amounts due, and made frequent mailings to its subscribers.

Plaintiff's use in this case (Br. 43) of the quotation from *Yaffe* v. *Powers*, 454 F.2d 1362, 1365 (1st Cir. 1972), for the proposition that "vaguely-perceived management problems" can be overcome by the flexibility of the court to deal with a class suit, is misleading. In *Yaffe*, the Court of Appeals reviewed the dismissal of a class action which had occurred prior to any discovery having been taken on issues of compliance with the factors enumerated in Rule 23. The Court said:

> "To pronounce finally, prior to allowing any discovery, the non-existence of a class or set of subclasses, when their existence may depend on information wholly within defendant's ken, seems precipitate and contrary to the pragmatic spirit of Rule 23. Evidence which might be forthcoming might well shed light on a final decision on this issue." at 1366.

The *Yaffe case* was in the same posture as this case was when the Court of Appeals decided *Eisen II* in 1968. However, when *Eisen III* was decided in 1973, the discovery and evidence that was not present in *Yaffe* was in the record in this case and supports the determination that this action cannot be maintained as a class action.

VI

The jurisdiction of the Court of Appeals.

The Court's grant of certiorari requested the parties to brief and argue, in addition to the other questions presented, the jurisdiction of the Court of Appeals. In our submission, the Court of Appeals had ample jurisdiction, from whatever aspect the point is viewed, to hear and determine the case as it did on May 1, 1973. Its jurisdiction rested not only on the independent appealability of the District Court's orders below, but also upon its retention of its own jurisdiction in 1968, when it remanded the case to the District Court for a limited purpose only.

A. Appealability as of Right.

The District Court's orders of April 7, 1971 and April 4, 1972 constituted a "final" decision[25] appealable of right under 28 U.S.C. § 1291, for they directed the unprecedented (1) extraction, before trial, from the defendants of funds plaintiff needed to communicate with his own "class",

25. The orders were inextricably linked, because the imposition of notice costs on defendants rested on the prior determination that the suit was a proper class action. 52 F.R.D. at 272; A233. Both the District Court and the Court of Appeals ruled that appeal from the first order should not be heard separately from the second. 52 F.R.D. at 272; A233, A296.

(2) infliction of this unrecoverable penalty upon the basis of a single judge's quick impression of the merits of a difficult antitrust and Exchange Act case, (3) provision of so inadequate a notice to the class, even though obtained at great cost, that defendants could not reasonably expect any protection under *res judicata* if they won, and the rights of absent class members were clearly denied, (4) misconstruction of Section 4 of the Clayton Act as granting recovery not to individuals but to a "class" which included persons not injured in their business or property, and (5) misconstruction of the decisional law for recovery under Section 6 of the Exchange Act to authorize an award of damages to those not injured. It was not only proper but imperative that these matters be set aright, not only for this case but for others awaiting its outcome.

The District Court's orders did not deal with the elements of the underlying antitrust action, except for a tentative preview of the merits to justify summarily depriving defendants of their property. The orders affected matters separable from, and collateral to, the rights asserted in the main action. They were, in the words of this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949):

> ". . . too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." at 546.

The District Court's rulings raised a separate and fundamental issue: whether the action, otherwise conceded to be unmanageable (A196-197), could be continued as a class action by use of makeshift and unlawful devices. These rul-

ings were in sharp conflict with the directions of the Court of Appeals in *Eisen II*, and they were ripe for review. Indeed, no meaningful later appeal could ever be had of the order that defendants pay $19,548 as an irretrievable contribution to plaintiff's lawsuit, for it was conceded that unless plaintiff won his case before the jury he would be unable to pay it back. No possible subsequent exercise of discretion by the District Court could repair that injury. Later judicial review would be as empty a rite as it would have been in *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684 (1950), if the ship had sailed without hope of return. Thus, the District Court's orders fell squarely within the "collateral order doctrine" of *Cohen* v. *Beneficial Industrial Loan Corp.* and were final for purposes of immediate appeal under 28 U.S.C. § 1291.

It is no answer to suggest, as plaintiff does (Br. 24), that an order of attachment, inadequately bonded, is not appealable. The function of an order of attachment is to preserve property for ultimate adjudication, and the amount of the bond is within the district court's discretion. The effect of the District Court's orders was not to preserve but to destroy permanently the defendants' right to $19,548.

The District Court considered that the exaction from the defendants of the costs of its notice program, to "the extent that this may result in the imposition of a burden on defendants prior to trial," was analogous to a preliminary injunction, 52 F.R.D. at 270; A227. The analogy supports appealability. A preliminary injunction requiring a defendant to make payments, when he could not recover them if the relevant statute [the Agricultural Marketing Agreement Act of 1937] was later held unconstitutional,

was stayed in the Court of Appeals pending review; this Court intervened by writ of certiorari "because important questions of federal law undecided by this Court were involved and pending appeals in other cases with similar issues were ready for argument." *United States* v. *Whiting Milk Co.*, 21 F. Supp. 321 (D. Mass. 1937), *stays continued sub nom. H. P. Hood & Sons, Inc.* v. *United States*, 97 F.2d 677 (1st Cir. 1938), *opinion on merits* 26 F.Supp. 672 (D. Mass 1939), *aff'd.*, 307 U.S. 588, 591 (1939). The analogy provides an unnecessary but additional ground of appeal: orders granting injunctions are appealable of right under 28 U.S.C. § 1292(a)(1). Indeed, the District Court's orders in this case were sufficiently drastic to have permitted review by mandamus—had that been required—which would have presented to the Court of Appeals the whole range of the District Court's rulings. In analogous circumstances in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964) (involving mandamus to review the unprecedented direction that a defendant undergo a physical and mental examination)[26], this Court stated:

> "Here, however, the petition was properly before the court on a substantial allegation of usurpation of power in ordering any examination of a defendant, an issue of first impression that called for the construction and application of Rule 35 in a new context. The meaning of Rule 35's requirements of 'in controversy' and 'good cause' also raised issues of first impression. In our view, the Court of Appeals should have also, under these special circumstances, determined the 'good cause' issue, so as to avoid

26. In *Schlagenhauf*, the Court said that the need for guidelines for construction and application of the Federal Rules of Civil Procedure made it appropriate that the Court rule upon the point, even if it were dealing directly with the District Court rather than with the Court of Appeals. 379 U.S. at 112.

> piecemeal litigation and to settle new and important problems." at 111.

The fundamental policy of judicial economy reflected in 28 U.S.C. § 1291 was not ill-served by the Court of Appeals' reaching the class action question. As stated in *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964):

> "It is true that the review of this case by the Court of Appeals could be called 'piecemeal'; but it does not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered. We cannot say that the Court of Appeals chose wrongly under the circumstances. And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided." at 153.
>
> * * *
>
> "It is true that if the District Judge had certified the case to the Court of Appeals under 28 U.S.C. § 1292(b) (1958 ed.), the appeal unquestionably would have been proper; in light of the circumstances we believe that the Court of Appeals properly implemented the same policy Congress sought to promote in § 1292 (b) by treating this obviously marginal case as final and appealable under 28 U.S.C. §1291 (1958 ed.). We therefore proceed to consider the correctness of the Court of Appeals' judgment." at 154.

Despite sharp differences among the judges of the Second Circuit, expressed in their various opinions on the petition for rehearing *in banc*, they appeared unanimous that (as

Judge Mansfield stated, 479 F. 2d at 1021, A377): "[t]he issues raised by this appeal are of exceptional importance and therefore deserving of the most authoritative resolution possible." No Circuit Judge expressed any doubt that the Court of Appeals had jurisdiction.

Even plaintiff, although challenging jurisdiction (Br. 19-25), has tacitly conceded it. His petition for certiorari (p. 29) alternatively asked this Court to "grant the petition, in order to remand the case for consideration by the Court of Appeals in banc."

B. Retained Jurisdiction.

A separate independent basis for the Court of Appeals' jurisdiction in *Eisen III* was that its earlier opinion in *Eisen II* expressly retained jurisdiction, while remanding to the District Court for further findings to permit a proper review by the Court of Appeals. Plaintiff endorses the Court of Appeals' *Eisen II* jurisdiction (Br. 19-21), but contends that it lost that jurisdiction upon issuance of its 1968 mandate (Br. 20-21). That, we submit, ignores the language of the mandate which:

> ". . . remanded to said District Court for the proceedings in accordance with the opinion of this court. . . ." A138.

Directing the Court below to take evidence required in order to settle points insufficiently clear in the record before it, the Court of Appeals in *Eisen II* had said in its opinion:

> "Accordingly, the order appealed from is reversed; we retain jurisdiction, and the case is remanded for a prompt and expeditious evidentiary hearing, with or without discovery proceedings, on the questions

> of notice, adequate representation, effective administration of the action and any other matters which the District Court may consider pertinent and proper." 391 F.2d at 570; A133.

Throughout the Court of Appeals' majority opinion in *Eisen II* runs its determination that it could not effectively review the District Court's decision of September 27, 1966 on the facts found and appraised by the District Court. Its need for further evidence is exemplified at several points. On the issue of requisite notice to the class, the Court stated:

> "On the record before us we cannot arrive at any rational and satisfactory conclusion on the propriety of resorting to some form of publication as a means of giving the necessary notice . . . Not only did the court below fail to analyze and give proper consideration to the standards set forth in 23(c) (2); there was also a lack of evidentiary basis for the findings necessary to support rulings . . ."
>
> "Can any members of the class be identified through reasonable effort so that such persons may be given individual notice? Without an evidentiary hearing we do not see how this question can be answered. And, until it is answered, how is one to give any rational consideration to the question of what notice by publication would be deemed appropriate . . . ?" 391 F.2d at 569; A130-31.

On the issue of manageability, the Court of Appeals ruled:

> "Before allowing the suit to proceed, a further inquiry by the District Court is necessary in order to consider the mechanics involved in the administration of the present action . . . If as a practical matter

> class members are not likely ever to share in an eventual judgment, we would probably not permit the class action to continue." 391 F.2d at 567; A127.

In *Eisen III*, the Court of Appeals did what it had said in *Eisen II* it would do:

> "We adhere to what we have written in support of the remand of this case in *Eisen II*. On the basis of the new evidence adduced on the remand, what we are now doing is interpreting and applying various provisions of [Rule 23]." 479 F.2d at 1013-14; A361.

Plaintiff's argument that the Court of Appeals' mandate carried away its jurisdiction irretrievably (*e.g.* Br. 16, 20)[27] ignores not only the procedure adopted by the Court of Appeals, but also the broad grant of authority conferred by 28 U.S.C. §2106:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and

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27. The dicta from two cases cited by plaintiff (Br. 20) miss the point. In neither case did the Court of Appeals purport to retain jurisdiction. In *In re Nevada-Utah Mines & Smelter Corp.*, 204 Fed. 982 (2d Cir. 1913), the Court simply denied a rehearing of the cause, and also declined an application to intervene made in the Circuit Court of Appeals after issuance of its mandate affirming the order of the District Court. The Court indicated it had power to require return of the mandate had it so desired. In *Meredith* v. *Fair*, 306 F.2d 374 (5th Cir. 1962), the Court did not retain jurisdiction. It held that its mandate could not be stayed after issuance, but recalled the mandate to amend and clarify it. The Court's statement that "control over the judgment below comes to an end after the mandate has been issued" meant only that it is too late to stay a mandate after it has already been issued. 306 F.2d at 376.

> may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Retention of jurisdiction by a Court of Appeals, pending completion of such further proceedings as it has directed, is an accepted practice. As explained in *Hunter Douglas Corp.* v. *Lando Products, Inc.*, 235 F.2d 631 (9th Cir. 1956):

> "The perfection of the original appeal herein operated to transfer to the Court of Appeals jurisdiction of the cause; the jurisdiction of the trial court ceased and that of the Court of Appeals attached. The trial court was thereafter without authority to act in matters relating to the subject matter until the mandate was returned. In this case the mandate did not authorize the trial court to enter a judgment. The mandate contemplated no new decree. Any attempt to do so is void and of no effect.
>
> "This Court vacated a part of the original judgment and remanded the case for a restricted and limited purpose. Such was accomplished by the filing of the amended and supplemental findings of fact. We conclude that these further findings are adequate to support the judgment on the counterclaim in this action originally appealed from, and this court has a retained jurisdiction arising from the original appeal to consider any attack now made upon the original judgment on the counterclaim, including the contention that the evidence does not support the findings. This we will proceed to do." at 632-633. (footnote omitted)

A limited remand can direct the district court to hold further hearings, see *Zachos* v. *Sherwin-Williams Co.*, 166

F.2d 79 (5th Cir. 1948), *judgment of affirmance reinstated*, 177 F.2d 762 (5th Cir. 1949):

> ". . . because of the failure really to try the issue of prior use, we order that our judgment of affirmance be suspended and that no mandate issue on it; and direct that the district court hear further evidence solely on the issue of prior use, and make findings of fact and conclusions of law thereon, and cause the same to be certified to this court to be considered by us as part of the record on this appeal. The parties will be thereafter given further hearing in this court. Let a mandate issue to the district court directing it to proceed thus." 166 F.2d at 81.

See also *Gordon* v. *Jefferson Davis Parish School Board*, 446 F.2d 266 (5th Cir. 1971), *reh. denied*, 460 F.2d 1062 (5th Cir. 1972); *Henderson* v. *United States*, 349 F.2d 712 (D.C. Cir. 1965); *McLindon* v. *United States*, 329 F.2d 238 (D.C. Cir. 1964). The further findings of a district court may be returned to the Court of Appeals as a "supplemental" record, as directed in *Cross* v. *Pasley*, 267 F.2d 824 (8th Cir. 1959), *modified on return of supplemental record*, 270 F. 2d 88 (8th Cir. 1959), *cert. denied*, 362 U.S. 902 (1960):

> "Accordingly, the district court is hereby directed to make and enter additional and appropriate findings of fact and conclusions of law nunc pro tunc as of the date of the original findings, and that as so entered such additional findings and conclusions be certified to this court as a supplemental record. Jurisdiction is retained." 267 F.2d at 827.

Upon receipt of a district court's further findings and conclusions, the Court of Appeals may affirm, *e.g.*, *United States* v. *Ueber*, 303 F.2d 462 (6th Cir. 1962), or reverse,

e.g., *United States* v. *Texas Education Agency*, 459 F.2d 600 (5th Cir. 1972), or reinstate the original mandate which it had suspended, see *Zachos* v. *Sherwin-Williams Co.*, *supra*. Examples of the utility and propriety of the Courts of Appeals withholding final judgment while, by means of the limited remand, further proceedings are completed in the courts and agencies below, are *Iannarelli* v. *Morton*, 463 F.2d 179 (3rd Cir. 1972); *AG Pro, Inc.* v. *Sakraida*, 481 F.2d 668 (5th Cir. 1973); *Cf. WKAT, Inc.* v. *Federal Communications Commission*, 296 F.2d 375 (D.C. Cir. 1961), *cert. denied sub nom. Public Service Television, Inc.* v. *Federal Communications Commission*, 368 U.S. 841 (1961).

C. Eisen I.

As this Court knows, in 1966-7 there was a question of the Court of Appeals' jurisdiction, but that question was resolved in favor of jurisdiction. *Eisen I*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967); A104. Defendants argued then (see page 5, *supra*) that the District Court's initial order (41 F.R.D. 147; A93) was not appealable (see defendants' March 23, 1967 petition for certiorari filed in this Court, No. 1195, October Term, 1966). Defendants adhere to that position.

Since that time, the "death knell" doctrine has been rejected by the Court of Appeals for the Third Circuit, *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3rd Cir. 1972), *cert. denied*, 407 U.S. 925 (1972), and the Court of Appeals for the Seventh Circuit, *King* v. *Kansas City Southern Industries, Inc.*, 479 F.2d 1259 (7th Cir. 1973). The Court of Appeals for the Fifth Circuit accepts the concept, but limits its application to cases where its need is clear. *Graci* v. *United States*, 472 F.2d 124 (5th Cir.

1973); *Songy* v. *Coastal Chemical Corp.*, 469 F.2d 709 (5th Cir. 1972); *Miller* v. *Mackey International, Inc.*, 452 F.2d 424, 427 n.3 (5th Cir. 1971); *Gosa* v. *Securities Investment Co.*, 449 F.2d 1330 (5th Cir. 1971); *Lamarche* v. *Sunbeam Television Corp.*, 446 F.2d 880 (5th Cir. 1971). The Court of Appeals for the Ninth Circuit notes the existence of the doctrine as being so limited as not to apply to the cases which have come before it. *Falk* v. *Dempsey-Tegeler & Co., Inc.*, 472 F.2d 142 (9th Cir. 1972); *Weingartner* v. *Union Oil Company of California*, 431 F.2d 26 (9th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971).

The Court of Appeals for the Second Circuit has adhered to the doctrine. *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972); *Korn* v. *Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971); *Caceres* v. *International Air Transport Association*, 422 F.2d 141 (2d Cir. 1970); *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969); *Green* v. *Wolf Corp.*, 406 F.2d 291, 295 n.6 (2d Cir. 1968) *cert. denied*, 395 U.S. 977 (1969). But even in the Second Circuit doubts about the doctrine have been expressed. See *Korn* v. *Franchard*, *supra*, at 1307, and *Lerman* v. *Tenney*, 459 F.2d 482 (2d Cir. 1972) (Friendly, C.J., concurring in both cases). Apparently in the Second Circuit the doctrine is limited to claims of individual damage on the order of $1000 or less, and there is concern about the need to provide fairness to defendants, as reflected by footnote 1 in *Eisen III*, 479 F.2d at 1007; A348-9, and by Judge Friendly in *Korn* v. *Franchard Corp.*, *supra*, 443 F.2d at 1307.

The point need not be decided now. Even absent the "death knell" ruling, there were ample independent grounds

for immediate appellate review of the District Court's orders supporting its "class" determinations. On the other hand, if the "death knell" question were correctly decided against defendants in 1966, that decision provides an additional basis of jurisdiction now: it supports the jurisdiction which was exercised by the Court of Appeals in *Eisen II* and retained until *Eisen III*.

D. Appeals in other cases.

Plaintiff extravagantly claims that the Court of Appeals has held that "all class action determinations are appealable . . ." (Br. 16). The Court of Appeals did not so hold. The Court stated that the Court of Appeals' jurisdiction ran equally to defendants, in this case, where jurisdiction had already been invoked on behalf of plaintiff (479 F.2d at 1007 n. 1, A348), and went on to argue that class action determinations "should be" appealable in the future. The footnote stated that by "extension or interpretation of *Eisen I*" defendants should be able to appeal class action determinations where, as here, the requisites of *Cohen* are met and delay in review would cause irreparable harm. If it had held every class action determination appealable, it would have revolutionized, by a footnote, the law of the Second Circuit, *e.g.*, *Korn* v. *Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971); *Caceres* v. *International Air Transport Association*, 422 F.2d 141 (2d Cir. 1970); *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969). No Circuit Judge in the opinions on rehearing in *Eisen III* adverted to such a revolution or suggested that there was any lack of jurisdiction in the Court of Appeals to hear this particular case.

There need be no fear this case presages numerous appeals of class action determinations. This case, and the precedent it furnishes, will serve to reduce the number of such appeals, because it settles substantial questions of law. The principle was recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949):

> "Here it is the right to security that presents a serious and unsettled question. If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question." at 547.

As stated in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964):

> "However, in this instance the issue concerns the construction and application of the Federal Rules of Civil Procedure. It is thus appropriate for us to determine on the merits the issues presented and to formulate the necessary guidelines in this area. See *Van Dusen* v. *Barrack*, 376 U.S. 612. As this Court stated in *Los Angeles Brush Corp.* v. *James*, 272 U.S. 701, 706:
>
> > '[W]e think it clear that where the subject concerns the enforcement of the . . . Rules which by law it is the duty of this Court to formulate and put in force . . . it may . . . deal directly with the District Court. . . .'
>
> See *McCullough* v. *Cosgrave*, 309 U.S. 634.
>
> "This is not to say, however, that, following the setting of guidelines in this opinion, any future allegation that the District Court was in error in

applying these guidelines to a particular case makes mandamus an appropriate remedy. The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.' *Parr* v. *United States*, 351 U.S. 513, 520; see *Bankers Life & Casualty Co.* v. *Holland*, *supra*, at 382." 379 U.S. at 112.

VII

The decision below is supported by compelling principles of public policy.

The philosophy running through the District Court's decisions is that plaintiff's action must be afforded class action status, and that no cost is too great to attain that end because defendants, who are alleged to be lawbreakers, will otherwise go unpunished and retain their ill-gotten gains. See American College of Trial Lawyers Report, *supra*, at pp. 18, 21 thereof. The cost of class action status here would have been violation of the principles of the substantive law under which this action is brought, the due process guarantees to both defendants and class members, defendants' Seventh Amendment guarantee, and Rule 23. Other costs would have been the imposition of a great burden on the judicial process and subverision of compelling principles of public policy. In commenting on such costs, the American College of Trial Lawyers Report, *supra*, has said:

> "The (b)(3) class suit has mandated heavy expenditures of judicial time, effort and expense. The expenditures have been sustained only by sacrificing procedural and substantive fairness to the

> party opposing the class. Nor does it appear that these burdens can in any sense be justified by the limited benefits accruing to class claimants." at p. 6.

Rule 23(b)(3) was designed to achieve "economies of time, effort and expense . . ." in situations where common class questions predominated over solely individual questions. Advisory Note, 39 F.R.D. at 102; 19 sa. The Advisory Committee stated that "[i]t is only where this predominance exists that economies can be achieved by means of the class-action device." *Id.* at 103; 19 sa. Thus, according to the Advisory Committee, Rule 23(b)(3) is a device for consolidating numerous *existing* claims in one forum to prevent repetitious litigation and to achieve "economies of time, effort and expense." Here, on the other hand, plaintiff *sua sponte* has brought into the District Court 6,000,000 people who had made no claim and surely would not have made any claim were it not for the gleam in a lawyer's eye.

Recognition of the limited capabilities of our federal judicial system is essential if Rule 23, due process and the right to trial by jury guaranteed by the Seventh Amendment are to survive.

> "In theory and in an initial off-hand reaction, it is tempting to say: why not let everyone who asserts a somewhat related grievance come into a common arena to resolve their controversy? However, on a moment's reflection, it should be apparent that the capacities of judges and jurors to absorb the factual situations thus presented are finite and that courthouses are not coliseums." *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, at 298 (2d Cir. 1969)

The Chief Justice has warned that "the federal court system is for a limited purpose, and lawyers, the Congress and the public must carefully examine each demand they make on that system." [28] Both the Second and the Eighth Circuit Courts of Appeal have observed the heavy demand made upon the courts by the mass consumer claims asserted in the *Antibiotics* cases. *Pfizer, Inc.* v. *Lord*, 449 F.2d 119, 121 (2d Cir. 1971) ("sizeable judicial resources" were consumed); *Pfizer, Inc.* v. *Lord*, 456 F.2d 532, 542 (8th Cir. 1972) ("unusual burdens upon an already overburdened federal court system"). As the Court of Appeals for the Third Circuit has said in *Hackett* v. *General Host Corp.*, 455 F.2d 618 (3rd Cir. 1972), *cert. denied* 407 U.S. 925 (1972) ". . . scarce federal resources cannot be allocated on the assumption that they must provide a forum for the vindication of every individual wrong . . ." at 626. The limited benefits (if any) that class actions such as this produce for class members are far outweighed by the fact that ultimately the costs of such litigation will be borne by the public itself as taxpayers, shareholders and consumers; and by litigants who seek access to already overcrowded federal courts for vindication of real and substantial claims.

The only justification that has been advanced for permitting this case to be maintained as a class action is that alleged "wrongdoers" cannot be permitted to "retain the fruits of their illegality" or future wrongdoers will not be deterred from violation of the antitrust laws and the Exchange Act. It is such deterrence, it is argued, that justi-

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28. Burger, "The State of the Judiciary—1970", 56 A.B.A.J. 929, 933 (1970).

fies perversion of the substantive rights of defendants and absent class members. Plaintiff urges that the Court of Appeals has unjustifiably limited the discretion of the District Court to implement this perception of public policy.[29] The discretion of a district court, however, must be brought up short where it results in invasion of substantive rights. The orders of the District Court are exactly the kind Mr. Justice Black warned against in his 1966 dissent from the Court's promulgation of Rule 23:

> "I have gone over all the proposed amendments carefully and while there are probably some good suggestions, it is my belief that the bad results that can come from the adoption of these amendments predominate over any good they can bring about. I particularly think that every member of the Court should examine with great care the amendments relating to class suits. It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that 'class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it is wise.' " 383 U.S. 1032, 1035.

If application of Rule 23 is determined by collateral considerations, such as its use to promote what some conceive

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29. Plaintiff relies on lengthy quotations from the panel decision in *Katz* v. *Carte Blanche Corporation*, F.2d , 17 F.R. Serv. 2d 279 (3d Cir. 1973), (petition for rehearing in banc granted, June 20, 1973), to support his argument that the Court of Appeals in *Eisen III* unjustifiably limited the discretion of the District Court. It should be noted, however, that in *Katz* the full Court in its order of June 20, 1973 granting the *in banc* petition *vacated* the judgment of the panel. A copy of the Court's order is reprinted in the appendix hereto. 29-30 sa.

to be desirable ends, its application would eventually be capricious and depend upon varying philosophies of the district courts as to what type of litigation is, or is not socially beneficial. By contrast, the Court of Appeals below instructed that the determination must be made on the criteria set forth in Rule 23.

Insistence upon such neutral criteria in *Eisen II* and *Eisen III* will not have the consequence forecast by plaintiff, Judge Oakes or the *amici* briefs supporting reversal. The decision below is carefully limited and circumscribed to apply only to "such a case as this". This case involves a class of millions of members dispersed throughout the world. The alleged claims are *in personam* for miniscule money damages. Any possible injunctive relief has long been moot. The names and addresses of millions of class members are identifiable with reasonable effort. More millions of the class members are not identifiable. The relationship between class members and defendants is the classic adversarial relationship with no continuing communication.

The Court of Appeals' decisions (*Eisen II and Eisen III*) leave ample room for effective civil rights and environmental suits. Such suits are traditionally brought for injunctive relief and, under the decisions below, would not be subject to the notice requirements specified in *Eisen;* nor do they require a "fluid recovery" in order to be manageable. Indeed, in cases such as those class action designation is largely a formality for the plaintiffs. What is important is that the judgment naturally benefits all persons similarly situated. See *Galvan* v. *Levine*, Dk. No. 73-1294 (2d Cir. December 3, 1973) (slip decision), where the

Court of Appeals affirmed denial of class action status for a suit under the Civil Rights Act brought on behalf of Puerto Ricans similarly situated who allegedly had been denied unemployment compensation benefits. The Court said:

> ". . . But insofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality, at least for the plaintiffs. As we have recently noted in *Vulcan Society* v. *Civil Service Comm'n*, — F.2d —, — (1973), slip opinions, —, —, what is important in such a case for the plaintiffs or, more accurately, for their counsel, is that the *judgment* run to the benefit not only of the named plaintiffs but of all others similarly situated, see *Bailey* v. *Patterson*, 323 F.2d 201, 206-07 (5 Cir. 1963), *cert. denied*, 376 U.S. 910 (1964); cf. *United States* v. *Hall*, 472 F.2d 261, 266 (5 Cir. 1972), as the judgment did here." at slip opinion pp. 569-570.

The great progress made in civil rights decisional law before 1966 suffered little from the absence of amended Rule 23. Suits for money damages under environmental or civil rights laws are brought on behalf of classes far more circumscribed than in *Eisen*, such as downstream land owners or inhabitants of a single school district. Individual notice can be given to such classes where names and addresses are available with reasonable effort; or if they are not available, notice by publication would not be a "farce". Such cases are among those as to which the Court of Appeals did "not attempt any enumeration."

On the other hand, if the District Court's decisions had been allowed to become law, defendants in large purported class actions such as this would have been presented with the choice of continuing to litigate such monstrous class actions on the merits with the risk of financial ruin should they fail or settling as "an insurance policy" against ruin. See Handler, "The Shift from Substantive to Procedural Innovations in Antitrust Suits," 26 Record of the Association of the Bar of the City of New York 124, 127-134 (February, 1971). The Court of Appeals for the Second Circuit has noted that this *in terrorem* effect of Rule 23(b)(3) actions was never intended by Congress to supplement the remedies provided by the antitrust laws:

> ". . . if the flood-gates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery, implemented by the availability of the class suit as facilitated by the amendment of Rule 23 F.R.C.P., would result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress. If the antitrust laws were precise and crystallized something might be said in favor of such an enormous expansion of potential treble damage liability, speculative as the damages might be. But the fact remains that because there are few 'bright lines' in the area, even experts who have devoted their entire professional lives to the practice of antitrust law often find it impossible to advise a client with any degree of certainty whether his contemplated conduct will transgress lawful bounds." *Calderone Enterprises* v. *United Artist Theatre Circuit*, 454 F.2d

> 1292, at 1295 (2d Cir. 1971), *cert. denied* 406 U.S. 930 (1972). (footnote omitted)

One commentator[30] has written of his observation of the dynamics of the *in terrorem* factor in *City of Philadelphia* v. *American Oil Company*, 53 F.R.D. 45 (D.N.J. 1971):

> "At the hearing on the class action issue in the *Newark Gasoline* cases, a prominent plaintiffs' antitrust lawyer assured the Court that a class action on behalf of eight million users was manageable because:
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> > 'I have seen nothing so conducive to settlement of complex litigation as the establishment by the court of a class.' (tr. of proceedings, March 1, 1971, at 11)
>
> He added that two defendants had already settled, contingent upon the approval of the class, and added:
>
> > 'When two very competently represented and major litigants have settled, I think it shows this. *It shows that the problem is manageable.* It shows that they feel that this is the way that the litigation can be disposed of by settlement, namely, by having a class; whereas, if there were no class, it would not be disposed of by settlement. So I think that you sow the seed for the possibility of a settlement.' (*id*)" *Simon, supra*, 55 F.R.D. at 390. (emphases are those of the commentator)

Failure to observe accepted procedural and substantive requirements in class action determinations deprives defendants who maintain their innocence of a right to a trial

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30. Simon, "Class Actions—Useful Tool or Engine of Destruction", 55 F.R.D. 375, at 388-389 (1972).

on the merits. See *Schaffner* v. *Chemical Bank*, 339 F.Supp. 329 (S.D.N.Y. 1972), in which Judge Pollack, in denying class action status, said:

> "If Rule 23 as applied can principally result only in *in terrorem* accomplishments as a practical solution to gargantuan litigation, it is high time for needed revision along lines of practicality and the facts of litigation life. It is time then to seek a fairer balancing of the public interests at stake in order to aid the acknowledged wards of the Courts, the holders of small economic stakes in the injuries pictured.
>
> "As far as this court is aware, there are only isolated instances of the completion of actual trial of any class action litigation since the new Rules thereon went into effect. The dramatic recoveries that have been achieved in class actions have not been the result of a test of the merits in the crucible of a trial. This anomaly suggests that litigation is not necessarily the fair and just method of administering injuries involving hordes of individuals with variegated individual claims or defenses." at 337. (footnote omitted)

See *Bogosian* v. *Gulf Oil Corporation*, 71 Civ. 1137 (E.D. Pa. December 19, 1973)

This *in terrorem* effect has been called legalized blackmail:

> "Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional rights to a trial on the merits." Handler, *supra*, 26 Record at 130 (1971).

Counsel for defendants know of no large class action which has gone to trial, though economically forced settlements are legion. The result of the District Court's decisions would have permitted any lawyer who could draft a complaint to obtain a favorable class action decision and then an unwarranted settlement. There would, in short, be the danger that the Court of Appeals warned against in *Eisen II* (391 F.2d at 567; A126)—suits brought only for the benefit of lawyers. The American College of Trial Lawyers Report, *supra*, has concluded on the basis of the District Court's findings in this case that:

> "The District Court, upon remand by the United States Court of Appeals for the Second Circuit, has made a 'guesstimate' as to damages suffered by an average member of the 'class' and has arrived at a figure of approximately $1.30. As the action purports to be a treble damage action, the average recovery by the average odd-lot trader for the six years in question amounts to $3.90. If the Court is accurate in its 'guesstimate', the answer as to the number of claims that would be filed if plaintiff wins is a simple one: for all practical purposes, none. This is so because the cost of producing the records, if available, and typing and filing the simplest proof of claim would amount to many times the amount of the recovery in the average case. The District Court also estimated that the total amount of damages suffered by the 'class' of six million is somewhere between $22,000,000 and $60,000,000. If attorneys for the 'class' are successful and are awarded the usual percentage of the recovery, they will receive at least $5,400,000 whereas each plaintiff in the 'class', if he bothers to collect the records and file a proof of claim, will receive an average of $3.90." at 23-24.

The argument that actions such as this can only be maintained as class actions, and that if they are not alleged wrongdoers will not be brought to heel, is simplistic. The facts of this case do not cry out for the extraordinary treatment plaintiff seeks. The Department of Justice serves as the guardian of the public interest under the antitrust laws. In 1969 it permitted the alleged conspirators to merge, and they are now conducting the odd-lot business as the only odd-lot firm on the Exchange. Plaintiff has always had an available forum in which to appear formally or informally to petition the S.E.C. for relief from an inappropriate odd-lot differential, and could have obtained judicial review of any action or inaction of the S.E.C.

The Court below recognized that existing law did not afford a forum through which compensation can be made available for millions of dispersed consumers asserting small claims under the antitrust, securities and other laws. 479 F.2d at 1019; A372-373. The Court also recognized that it was beyond the power of the federal courts to create that forum by interpretation of Rule 23 to effect substantive changes in the law.

> "From our extensive study of the whole situation in working on this *Eisen* case it would seem that amended Rule 23 provides an excellent and workable procedure in cases where the number of members of the class is not too large. It seems doubtful that further amendments to Rule 23 can be expected to be effective where there are millions of members of the class, without some infringement of constitutional requirements. The problem is really one for solution by the Congress." *ibid.*

This Court has stated that determination of policy concerning consumer class actions in federal courts should occur in the Congress:

> "There is no compelling reason for this Court to overturn a settled interpretation of an important congressional statute in order to add to the burdens of an already overloaded federal court system. Nor can we overlook the fact that the Congress that permitted the Federal Rules to go into effect was assured before doing so that none of the Rules would either expand or contract the jurisdiction of federal courts. If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts." *Snyder* v. *Harris, supra*, 394 U.S. at 341-342.[31]

If plaintiff believes he has a meritorious claim—and is not merely relying on the *in terrorem* factor—the Court of Appeals' decision permits plaintiff to continue to prosecute this action on his own behalf. There is sufficient incentive for him, and his lawyers, to do so. Plaintiff has the incentive of treble damages, which will be the same in an individual action and a class action. Section 4 of the Clayton Act also permits recovery of a "reasonable attorneys' fee" by a successful antitrust plaintiff, and this fee is not limited to a portion of the damages recovered but is to be computed on the basis of the worth of the services.[32] The

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31. The Senate Commerce Committee is presently studying the question of consumer class actions.

32. See e.g. *Courtesy Chevrolet* v. *Tennessee Walking Horse B. & E.A.*, 393 F.2d 75 (9th Cir.), *cert. denied* 393 U.S. 938 (1968) (damages of $3,400; attorneys' fees of $10,000); *Advance Business Systems and Supply Co.* v. *SCM Corporation*, 287 F.Supp. 143 (D.Md. 1968), *aff'd* 415 F.2d 55 (4th Cir. 1969), *cert. denied* 397 U.S. 920 (1970) (damages of $16,714;

possibility of such an award was not considered by the Court of Appeals when it rendered its 1966 "death knell" decision. 370 F.2d 119 (2d Cir. 1966), *cert. denied* 386 U.S. 1035 (1967); A104.

If plaintiff is unwilling to continue his individual action, the observation of Court of Appeals for the Third Circuit is appropriate:

> "If the public interest issue involved in the individual suit is so insignificant that neither a private nor a public attorney deems it worthy of pursuit, despite the availability of an award of attorneys' fees in the event of success, then the public interest issue may well be so insignificant that the redress of the nine-dollar wrong should from a policy viewpoint be left to the realm of private ordering. Our scarce federal judicial resources cannot be allocated on the assumption that they must provide a forum for the vindication of every individual wrong however slight. . . . If in some cases as Judge Rosenn suggests the individual claim often will be so small that neither private nor public lawyers think it should be litigated, then that decision of the legal marketplace may be the best reflection of a public consciousness that the time of the lawyers and of the court should best be spent elsewhere." *Hackett* v. *General Host Corp., supra*, 455 F.2d at 625-626.

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attorneys' fees of $35,875); *Vandervelde* v. *Put and Call Brokers and Dealers Ass'n.*, 344 F.Supp. 118 (S.D.N.Y. 1972) (damages of $36,870; attorneys' fees of $55,000); *Finley* v. *Music Corp. of America*, 66 F.Supp. 569 (S.D. Cal. 1946) (no damages; attorneys' fees of over $9,000); *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 218 F.Supp. 490 (D. Mass. 1963), *reversed on other grounds*, 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964) (damages of under $30,000; attorneys' fees of $68,000); *Montague & Co.* v. *Lowry*, 193 U.S. 38, 48 (1904) (an attorney's fee of 150% of the damages awarded); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 346 F.2d 661 (6th Cir.), *cert. denied*, 382 U.S. 904 (1965) (allowing a $50,000 attorneys' fee based upon hours spent in preparation and trial).

CONCLUSION

The decision of the Court of Appeals should be affirmed.

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Respectfully submitted,

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